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SUPREME COURT OF THE STATE OF UTAH

# No. 7048

NICK MASICH,
*Plaintiff and Appellant,*

*vs.*

UNITED STATES SMELTING, REFINING & MINING COMPANY AND F. S. MULOCK,
*Defendant and Respondents*

## JURISDICTIONAL STATEMENT

**Statement as to the Jurisdiction of the United States Supreme Court on Appeal to Review the Judgment or Decree in Question.**

The plaintiff-appellant having presented this day their petition for appeal now files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to reverse the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

**The Statutory Provision Believed to Sustain the Jurisdiction**

This appeal is prosecuted from a final judgment or decree wherein and whereby the Supreme Court of Utah construed Chapter 1A, Title 42, Utah Code Annotated, 1943, known as the Utah Occupational Disease Disability Law and particularly Section 42-1A-3 thereof so that the plaintiff, by

such construction, is deprived of all right to recover damages sustained by him on account of the negligence of the defendants. The court held that the statute above mentioned deprived the plaintiff of all right to recover damages because he was not rendered totally disabled as that word is defined in 42-1A-12 of the Act and that the legislature of Utah by the Act intended to and did deprive all persons, including the plaintiff from recovering any damages or other redress on account of injuries to health caused by the negligence of the employer, defendants herein, unless such negligence resulted in rendering the employee afflicted, physically incapacitated by reason of an occupational disease as defined in the Act from performing any work for remuneration or profit. The court further held that the Act when so construed is a valid exercise of the power of the legislature of the state of Utah and is not in conflict with either the provisions of Article 4, Section 2 or the 5th Amendment or the 14th Amendment of the Constitution of the United States.

The final judgment or decree here appealed from was entered in the Supreme Court of Utah on March 25, 1948 and a petition for a rehearing, which was timely filed by the plaintiff, was denied on June 29, 1948.

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to reverse the final judgment or decree in question by virtue of the provisions of 28 U. S. C. Sec. 344, wherein it is provided that an appeal may be had from a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity.

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**The State Statutes Involved—Declaratory Judgments**

The state of Utah has a statute which provides for Declaratory Judgments, Utah Code Annotated, Title 104, Chapter 64. So far as material here such statute provides:

*104-64-1:* "The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

*104-64-2:* "Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

*104-64-7:* "All orders, judgments and decrees under this chapter may be reviewed as other orders, judgments and decrees."

**Provisions of the Utah Occupational Disease Disability Law**

In 1941 the Utah Legislature enacted a law known as the Utah Occupational Disease Disability Law which is contained in the Utah Code Annotated, Title 42, Chapter 1A. The Act provides:

*42-1a-2:* "This act shall be administered by the industrial commission of Utah, subject to the limitations hereinafter provided."

*42-1a-3:* "The right to recover compensation pursuant to the provisions of this act for diseases or injuries

to health sustained by an employee and arising out of or in the course of his employment, whether resulting in death or not, shall be the exclusive remedy against the employer."

*42-1a-12:* "The following terms as used in this act shall be construed as follows:

(a) " "Disablement" means the event of becoming physically incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit. Silicosis, as defined in this act, when complicated by active pulmonary tuberculosis, shall be presumed to be total disablement. "Disability," "disabled," "total disability" or "totally disabled" shall be synonymous with "disablement"."

*42-1a-13:* "(a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled by reason of an occupational disease subject to the following conditions:

(1) No compensation shall be paid when the last day of injurious exposure of the employee to the hazards of said occupational diseases shall have occurred prior to the effective date of this act.

(2) No compensation shall be paid for a disease other than silicosis unless total disability results within one hundred twenty days from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

(3) No compensation shall be paid in case of silicosis unless during the ten years immediately preceding the disablement the injured employee shall have been exposed to harmful quantities of silicon dioxide ($SiO_2$) dust for a total period of not less than five years in this state and unless total disability results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

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(4) No claim shall be maintained nor compensation paid unless the claim has been filed with the commission in writing within the time fixed by the appropriate subdivision of Section 49 of this act.

(b) There is imposed upon every employer a liability for the payment of compensation to the dependents of every employee in cases where death results from an occupational disease, subject to the following conditions:

(1) No compensation shall be paid when the last day of injurious exposure of the employee to the hazards of said occupational disease shall have occurred prior to the effective date of this act.

(2) No compensation shall be paid for death from silicosis unless during the ten years immediately preceding the disablement the deceased employee shall have been exposed to harmful quantities of silicon dioxide ($SiO_2$) dust for a total period of not less than five years in this state.

(3) No compensation shall be paid for death from silicosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from silicosis for which compensation has been paid or awarded, and in such cases compensation shall be paid if such death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

(4) No compensation shall be paid for death from an occupational disease other than silicosis unless death results within one year from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from an occupational disease other than silicosis for which compensation has been paid or awarded,

and in such cases compensation shall be paid if such death results within three years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

(5) No claim shall be maintained nor compensation paid unless the claim has been filed with the commission in writing within the time fixed by the appropriate subdivision of Section 49 of this act."

*42-1a-14:* "Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, provided that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide ($SiO_2$) dust during a period of sixty days or more after the effective date of this act."

*42-1a-27:* "The occupational diseases hereinafter defined shall be deemed to arise out of the employment, only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence."

*42-1a-28:* "For the purposes of this act only the diseases enumerated in this section shall be deemed to be occupational diseases:

(1) Anthrax.

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(2) Glanders.

(3) Poisoning by acetaldehyde or its compounds.

(4) Poisoning by acetanilide or its compounds.

(5) Poisoning by cyanogen and its compounds.

(6) Poisoning by chlorine and its compounds.

(7) Poisoning by arsenic or its compounds.

(8) Poisoning by antimony or its compounds.

(9) Poisoning by cadmium or its compounds.

(10) Poisoning by lead or its compounds.

(11) Poisoning by manganese or its compounds.

(12) Poisoning by mercury or its compounds.

(13) Poisoning by selenium or its compounds.

(14) Poisoning by tellurium or its compounds.

(15) Poisoning by vanadium or its compounds.

(16) Poisoning by phosphorous or its compounds.

(17) Poisoning by hydrogen sulphide or carbon bysulphide (bisulphide).

(18) Chrome ulceration and poisoning.

(19) Poisoning by toxic halogenated hydrocarbons.

(20) Poisoning by benzol or its derivaties, including toluol, xylol, and the nitro, nitroso, and amino derivatives of these substances.

(21) Methanol poisoning.

(22) Epitheliomatous cancer or ulcertain of the skin or of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances.

(23) Gastrointestinal disorders due to contact with petroleum products and their fumes.

(24) Dermatitis (Venenata) excluding any dermatitis of which the primary cause is infectious or parasitic in nature.

(25) Synovitis, or tenosynovitis, or bursitis, or cellulitis, of the wrist, elbow, knee, or hand, due to continual pressure or friction or to repeated trauma or vibration of tools.

(26) Ulceration of the skin or destruction of tissue due to the prolonged exposure to roentgen rays or radium emanations.

(27) Silicosis."

*42-1a-29:* "For the purpose of this act "silicosis" is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust ($SiO_2$) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations."

*42-1a-30:* "In case of disability or death from silicosis complicated with tuberculosis of the lungs, compensation shall be payable as for disability or death from uncomplicated silicosis. In case of disability or death from silicosis when complicated with any disease other than pulmonary tuberculosis, compensation shall be reduced as provided in Section 51."

The foregoing quoted provisions of the act are deemed to be all that have any direct bearing on the questions presented for review.

In addition to the above quoted provisions the act in substance provides as follows:

Section 42-1a-4 provides that the Industrial Commission may sue and be sued.

*42-1a-5* authorizes the commission to make and publish rules and regulations.

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*42-1a-6* provides for the filing of claims before the commission and service of notice thereof on the insurance carrier.

*42-1a-7* grants to the commission power to administer oaths, certify affidavits, issue subpoenas, compel attendance of witnesses and the production of papers, books, accounts, documents and evidence.

*42-1a-8* grants to the commission or any party to a proceeding to take depositions of witnesses.

*42-1a-9* requires that a complete record of proceedings had before the commission be kept.

*42-1a-10* defines an employer as the state and each county, city, town, district, board of education, every person, firm and private corporation, public utility, independent contractor who has in service three or more as operatives regularly employed in the same business or in or about the same establishment. Those who employ agricultural laborers or domestic servants do not come under the act unless they choose to do so.

*42-1a-11* as amended by Laws of Utah, 1943, Chapter 49, provides that officers in the service of the state and its cities, towns, counties, boards of educations and all officers and employees of state institutions of learning are employees, workmen and operatives within the meaning of the act. Every person, except agricultural laborers and domestic servants who regularly employs three or more persons in the same business or in or about the same establishment, lessees of owners and their employees are also made employers within the meaning of the act.

*42-1a-15* provides that each employee entitled to compensation shall receive $12.00 per week during total disability, plus 5% additional for each dependent minor child under

18 years, provided that in no event shall the total payments exceed $3000.00. In case of death a maximum of $3000.00. shall be paid less any amount paid for total disability the same to be paid at the rate of $12.00 week, plus 10% for each minor child not to exceed five dependent minor children. In case of total disability the employer shall pay for medical service, hospitalization and medicines as may be reasonably required not exceeding $500.00. In case of death the employer shall pay burial expenses not to exceed $150.00.

*42-1a-16* provides that employers shall carry compensation insurance with the state insurance fund or with a private insurance company, unless the employer shall furnish annually to the commission satisfactory proof of financial ability to pay any compensation that may be awarded.

*42-1a-17* provides that counties, cities, towns and boards of educations may insure in the state insurance fund or may pay compensation direct.

*42-1a-18* provides for the state to pay into the insurance fund the cost of compensation insurance of state employees.

*42-1a-19* provides for private employers who insure with the state insurance fund to pay the premiums on their compensation insurance.

*42-1a-20* makes a number of sections of Revised Statutes of Utah, 1933, not applicable to the act.

*42-1a-21* makes it a misdemeanor for the failure of the employer to fail to comply with the act and also for an employee or his dependents to present a false claim for compensation.

*42-1a-22* provides that an employee or in case of death his dependents may apply to the commission for an award

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of compensation of a non-complying employer or if an award is granted such non-complying employer shall pay the amount of the award within ten days after receiving notice of the final award and if the same is not paid within ten days the award shall be increased by 25%.

*42-1a-23* provides that an award may be filed in the office of the district court of any county in the state and when so filed the same must be docketed and when so docketed the same becomes a lien upon the real property within the county of the employer and remains a lien for eight years unless previously satisfied and that execution may issue thereon within the same time and in the same manner and with the same effect as if said award were a judgment of the district court.

*42-1a-24* provides that a judgment obtained by the commission of finance based upon non payment of premiums in cases of insolvency, receivership or bankruptcy of the employer shall be preferred against the assets in the hands of the trustee in bankruptcy, receiver or assignee, but shall not be preferred over pre-existing liens.

*42-1a-25* provides that compensation payable under the act, exclusive of medical, hospital and funeral benefits, for disability or death due to silicosis, notwithstanding anything in this act otherwise provided, shall be payable to employees or their dependents in the following manner and amounts: If disability or death occurs during the third calendar month after the month in which this act becomes effective, not exceeding the sum of $500.00; if disablement or death occurs during the fourth calendar month after which this act becomes effective, not exceeding the sum of $550.00; thereafter the total compensation and benefit payable for disability and death shall increase at the rate of $50.00 each calendar month, provided that in no event shall the aggregate amount payable exceed a total of $3000.00.

*42-1a-26* provides that no compensation shall be allowed for the first seven days of disability unless such disability continues for a period of more than four continuous weeks, except for the disbursements authorized for medical, nurse and hospital services and for medicines and funeral expenses shall be made by the employer.

*42-1a31* provides that a wife living with her husband, children under the age of eighteen years or over such age if physically or mentally incapacitated who are living with their parents at the time of the death of the parent or who is legally bound for their support shall be presumed wholly dependent for support upon a deceased employee. In other cases dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in death of the employee. No person shall be considered as a dependent unless he is a member of the family of the deceased employee, or bears to him the relation of husband or wife, lineal decedent, ancestor or brother or sister. The word child as used in the act shall include posthumous child, and child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words brother or sister.

*42-1a-32* provides that an alien dependent who resides outside of the United States of America and any of its dependencies and Canada shall receive not to exceed one-half of the amount provided for in the act.

*42-1a-33* provides that compensation shall be made to one or more of the dependents for the benefit of all the dependents, and shall be used as the commission may direct. Application for compensation may be made by the surviving widow for herself and minor children. If all dependents are minors the application shall be made by the guardian or next friend of such minors. If a dependent dies during the period covered by weekly payments the right to further

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compensation shall cease. If the widow is the sole dependent and she marries during the period covered by weekly payments she shall be entitled to receive in a lump sum one-third of the benefits remaining unpaid. In case the payment is increased 5% or 10% for each dependent minor child such increase shall cease at the death, marriage, attainment of the age of eighteen years or termination of dependency of each child.

*42-1a-34* provides that the amount of an award of compensation may be granted, increased, decreased or terminated only upon proof of fraud or undue influence or of change of condition and then only upon application of a party in interest made within one year after the denial of award or where compensation has been awarded after the award or the date when the last payment was made under the award, except in case of silicosis where such time limit shall be two years.

*42-1a-35* provides that under special circumstances the award may be made payable in one or more lump sum payments.

*42-1a-36* provides that compensation before payment shall be exempt from attachment and execution and shall be paid only to employees or their dependents.

*42-1a-37* provides that an applicant may apply for a rehearing before the commission within thirty days after written notice of a decision and that a rehearing must be requested before a review may be had by the Supreme Court.

*42-1a-38* provides that within thirty days after notice that an application for a rehearing has been denied or if the application is granted within thirty days after notice of decision in the rehearing any party affected may apply to

the Supreme Court for a writ of certiorari for having the lawfulness of the award inquired into and determined.

*42-1a-39* provides that the writ shall be returnable not later than 30 days after issuance and shall direct the commission to certify its record and evidence taken in the case to the court. No new evidence shall be taken but the review shall be had on the record certified to the court by the commission. The review shall not extend further than to determine:

(a) Whether or not the commission acted without or in excess of its powers:

(b) Whether or not findings of fact are supported by substantial competent evidence having probative value.

*42-1a-40* provides that the commission shall make in writing findings of fact and conclusions of law and file the same with its secretary and that the findings and conclusions made by the commission shall on questions of facts be conclusive and final. That parties interested in a proceeding before the commission shall have the right to appear in any review and that upon the hearing the court shall enter judgment either affirming or setting aside the award.

*42-1a-41* provides that the code of civil procedure relating to writs of certiorari, so far as applicable and not in conflict with the act shall apply to proceedings for a review and that no court, except the Supreme Court, shall have jurisdiction to review, reverse or annul any award of the commission or to suspend or delay the operation or execution thereof.

*42-1a-42* provides that the commission shall have full power to regulate and fix the fees of attorneys in all cases coming before the commission.

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*42-1a-43* provides that the commission shall not be bound by the usual common or statutory rules of evidence or by any technical or formal rules of procedure, other than as provided by the act, but hearsay evidence shall not be admissible. No one to a proceeding shall be prejudiced by failure to make objections or take exceptions.

*42-1a-44* provides that a minor working at an age permitted under the law shall be deemed *sui juris* for the purposes of the act and that no other person shall have a cause of action for compensation for injury to a minor workman but if a lump sum award to a minor is awarded the same shall be paid only to his legally appointed guardian.

*42-1a-45* provides that an agreement to waive compensation, or to pay any part of the premium paid by his employer shall be void. It also provides that it is a misdemeanor for an employer to deduct any portion of the premium from the wages of the employee except that such provision shall not prevent a lessor from deducting from the proceeds of ores mined by lessees on insurance premium as provided in Section 11 (b) of the act.

*42-1a-46* provides that an employee claiming compensation shall, when required, submit himself to a medical examination, the expenses of which shall be paid by the employer; that if the employee refuses to submit to such examination or obstructs the same his right to have his claim for compensation considered or his right to receive payments or compensation theretofore granted shall be suspended during the period of such refusal or obstruction.

*42-1a-47* provides that upon the filing of a claim for compensation for death from an occupational disease and the commission deems it necessary that an autopsy be had to determine the cause of death an autopsy may be ordered by

a member of the commission and that all proceedings for compensation shall be suspended upon the refusal of the claimant to permit the autopsy when so ordered. When an autopsy is ordered by the commission no cause of action shall lie for the performance thereof.

*42-1a-48* provides that a disabled employee who desires to leave the locality where he has been employed must notify the commission of such intention and accompany such notice with a certificate from the attending physician setting forth the exact nature of the disability, the condition of the employee with a statement of the probable length of time that disability will continue. After receiving such notice and information the commission may consent that the employee leave such locality and give notice thereof to the employer. Unless the commission gives such consent the employee shall not be entitled to compensation during such absence. The commission has authority to order the employee to return for further treatment or examination and failure to do so precludes him from recovering compensation.

*42-1a-49* provides that unless a written claim is filed with the commission within one year after the cause of action in case of claim based upon silicosis and within sixty days of diseases other than silicosis within sixty days, except in case of benzol or its derivatives within ninety days after the cause of action arises the right to compensation shall be forever barred.

In case the claim is made by a dependent based upon the death of the employee the claim must be filed within six months after the cause of action arises otherwise it is barred.

*42-1a-50* provides that upon request of the commission the attorney general or under his direction any district or

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county attorney shall institute and prosecute any necessary action or proceeding for the enforcement of the act or collecting any money due the state insurance fund or the collection of any penalty provided for in the act. The attorney general is also required to defend suits, actions or proceedings brought against the commission, but the commission may employ special counsel.

*42-1a-51* provides that when an occupational disease is aggravated by any other diseases or infirmity not compensable or where disability or death from any cause not itself compensable is aggravated, prolonged, accelerated or contributed to by an occupational disease the compensation allowable shall be reduced or limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of disability or death, as such occupational disease as a causative factor bears to all the causes of such disability or death.

*42-1a-52* provides that compensation attainable under the act shall not be in addition to compensation for injuries resulting from accident as provided by Title 42, Chapter 1, Revised Statutes of Utah, 1933.

*42-1a-53* provides that no liability of an employer is created by the act for disability or death occurring prior to the date the act becomes effective.

*42-1a-54* provides that an employee, or in case of his death his dependents, shall not be entitled to compensation for disability caused wholly or in part by the wilful misconduct, wilful self exposure or disobedience of reasonable rules and regulations adopted by the employer and which the employee knows to exist.

Wilful self exposure shall include failure or omission of the employee or applicant for employment truthfully to

state in writing to the best of his knowledge an answer to any inquiry made by the employer, the place, duration and nature of previous employment, whether or not he had previously been disabled, laid off or compensated in damages, or otherwise, because of any physical disability and give full information about the previous status of his health, previous medical and hospital attention and exposure to tuberculosis.

*42-1a-55* provides that when disability resulting from an occupational disease, as defined in the act, is caused by the wilful failure of an employer to comply with the law or any lawful order of the commission compensation shall be increased 15%, except in case of an occupational disease resulting in death.

The complaint further contends that the Utah Occupational Disease Disability Act above mentioned is likewise unconstitutional and deprives plaintiff of property without due process of law in that by its opinion the Supreme Court of Utah in effect assumed legislative functions by construing the act in such a way as deprives the plaintiff of his common law rights without any language in the act to support such a result.

**The Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented**

The judgment here sought to be reviewed was entered on March 25, 1948.

Thereafter and on May 6, 1948 the plaintiff filed his petition for a rehearing and brief in support thereof.

On June 28, 1948 the petition for a rehearing was denied and the judgment or decree became final.

The petition for appeal herein was presented and filed on September 17, 1948.

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**Statement Showing That the Nature of the Case and of the Ruling of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied upon.**

The plaintiff brought his action against the defendants in the Third District Court of the State of Utah, in and for Salt Lake County, Utah. The original complaint was filed in that court on the 29th day of August, 1946. Thereafter and on the 18th day of October, 1946 an amended complaint was filed. On the 18th day of October, 1946 answers were filed by the defendants. The action was brought by the plaintiff pursuant to Title 104, Chapter 64 and particularly Section 2 thereof to secure a determination as to the construction or validity of the Utah Occupational Disease Disability Law, Title 42, Chapter 1a, and particularly sections 42-1a-2; 42-1a-12; 42-1a-13; 42-1a-28 and 42-1a-29 thereof.

Upon the issues of law raised by the pleadings the plaintiff contended; (a) that a proper construction of the Utah Occupational Disease Disability law did not, if property construed, deprive the plaintiff of his common law right and remedy to maintain an action for the injuries which he had sustained on account of the negligence of the defendants as alleged in his complaint; and (b) that if the said act should be construed in such a way as to deprive the plaintiff of his common law right of redress for the injuries which he had sustained by reason of the negligence of the defendants as alleged in the amended complaint then and in that event the Utah Occupational Disease Disability Act was invalid and unconstitutional. The defendants contended that the Utah Occupational Disease Disability Act deprived the plaintiff of all right to recover damages or compensation on account of the injuries complained of and that in so doing such legislative enactment did not offend against any provisions of either the Constitution of Utah or the Constitution of the United States. The District

Court of Salt Lake County ruled in favor of the defendants and against the plaintiff and entered judgment denying the plaintiff all right to recover damages or compensation and that the act is valid.

It was stipulated by the parties that no findings of fact need be made by the district court and pursuant thereto no findings were made.

From the judgment so entered by the district court the plaintiff timely prosecuted an appeal to the Supreme Court of Utah, the same being the highest court of the State of Utah.

Before the Supreme Court of Utah the plaintiff made its assignments of error attacking the decision of the district court and filed in the Supreme Court of Utah printed briefs and made oral argument attacking the judgment of the district court.

It was again contended before the Supreme Court of Utah; (a) that a proper construction of the Utah Occupational Disease Disability Law did not, if properly construed, deprive the plaintiff of his common law right and remedy to maintain an action for the injuries which he had sustained on account of the negligence of the defendants as alleged in his complaint; and (b) that if the said act should be construed in such a way as to deprive the plaintiff of his common law right of redress for the injuries which he had sustained by reason of the negligence of the defendants as alleged in the complaint then and in such event the Utah Occupational Disease Disability Act was invalid and unconstitutional. Likewise the defendants contended that such act deprived the plaintiff of all right to recover damages or compensation on account of the injuries complained of and that in so doing the act is not invalid or unconstitutional.

In the majority opinion of the Supreme Court of Utah, rendered and filed on March 25, 1948, the judgment of the

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lower court was affirmed. Touching the question of whether or not the act offended against the Constitution of the United States the court said:

> "We have concluded that the legislature occupied the complete field of silicosis and that under the facts alleged in this case Section 42-1a-3 bars plaintiff from maintaining this action. We now consider the question of whether or not the act is unconstitutional because it fails to provide compensation for a partially disabled employee. The contention is made that if a partially disable employee is not granted compensation and further if denied his common law right of action then he has been deprived of his remedy by due course of law for an injury done to his person contrary to the provisions of the Constitution of this State • • • Not until the year 1917 when the U. S. Supreme Court in the case of New York Central R. R. Co. *v.* White, 243 U. S. 188, 37 S. Ct. 248 held compulsory workman's compensation act constitutional was the uncertainty removed. The basis for holding such acts constitutional is that the state under its police power has the right to require industry to make compensation for the damages which the industry itself causes."

In plaintiff's oral argument and in his printed brief his counsel argued generally that if the act should be construed in such a manner as to deprive plaintiff of all right to recover compensation on account of the injuries complained of in his amended complaint then and in such event the act would be unconstitutional.

After the Supreme Court of Utah rendered its decision plaintiff timely filed his petition for a rehearing in which petition he specifically set out that the Utah Occupational Disease Disability Act was unconstitutional because in conflict with the provisions of Article 4, Section 2 and the 5th and 14th Amendments of the Constitution of the United States and with Sections 7, 11 and 24 of the Constitution of

the State of Utah and that the court erred in holding that he case of *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 37 S. Ct. 247, held that such an act is constitutional.

The Supreme Court of Utah on June 29, 1948 denied the petition for a rehearing without writing an additional opinion. The validity of the construction of the Utah Occupational Disease Disability Act has not been determined by any court prior to the decision herein mentioned.

**Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial**

One basic question is presented to the court on this appeal, namely: May a state legislature deprive an employee of all of his common law rights to recover damages or compensation where he has contracted an occupational disease as a result of the negligence of the employer without giving to the employee some other right or remedy for the redress of the wrong without offending against the constitutional provisions relied upon?

There is probably also included within the foregoing question the further question of whether or not a state court may lawfully so construe a statute such as the Utah Occupational Disease Disability Act so as to deprive an injured employee (who becomes affilicted with an occupational disease rendering him partially disabled on account of the negligence of the employer) from all right to recover for the injury sustained without offending against the constitutional provisions relied upon.

It is contended that these questions are substantial in that an employee is, under the conclusion reached by the Supreme Court of Utah, deprived of all right to recover for injuries negligently inflicted upon him by his employer unless: (a) the employee becomes incapacitated from performing any work for remuneration or profit; (b) even if the employee,

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plaintiff, becomes incapacitated from performing any work for remuneration or profit he may not recover because, as alleged in the amended complaint, his silicosis is not complicated with pulmonary tuberculosis nor does the silicosis with which he is afflicted fall within the silicosis within the meaning of the act. His silicosis as appears from the allegations of the amended complaint is not "characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern and by variable clinical manifestations." Thus even if the plaintiff employee should be totally disabled he is not entitled to compensation because nature did not see fit to make his silicosis manifest itself in the manner specified by the act. Moreover it will be noted by the provisions of U.C.A. 1943, 42-1a-13 an employee may not recover compensation unless he has been exposed to harmful quantities of silicon dioxide ($SiO_2$) dust for a total period of not less than five years in this state. (Utah) Thus under the act as construed by the Supreme Court of Utah an employee may be rendered totally disabled or may die as a result of the negligence of the employer and without any fault of his own and still no recovery of any kind may be had.

It is contended that a law which brings about such results is to say the least of doubtful validity and is of such a character as to affect all employees not only in Utah but through the United States in all of those employments where the employee may contract an occupational disease because of the negligence of the employer.

A copy of the opinion of the Supreme Court of Utah is attached hereto and marked "Exhibit "A".

## ARGUMENT

There is one and probably two questions presented by this appeal touching the matter of the jurisdiction of this

court to hear and determine the question of the validity of the act here brought in question:

First: Was the claimed unconstitutionality of the act timely raised?

Second: In light of the construction placed on the act is a Federal question presented?

## Point One

As will be noted from the allegations of the amended complaintif the plaintiff sought, pursuant to the Declaratory Judgment Act of Utah, to secure from the courts of Utah a construction of the Utah Occupational Disease Disability Act. There is no language in the act which expressly or by necessary implication precludes the plaintiff from recovering damages on account of the injury complained of. The kind of silicosis contracted by the plaintiff, as will be seen from the allegations of the amended complaint, is not the kind of silicosis within the meaning of the act as will be seen from the provisions of U.C.A. 1943, 42-1a-29 heretofore quoted. Under the laws of the state of Utah a complaint must be verified. U.C.A. 1943, 104-12-1. The plaintiff could not truthfully swear that the act was unconstitutional when he filed his amended complaint because at that time neither he nor his attorneys believed the act would be construed in such a manner as to render it vulnerable to such an attack. If the act had been construed in such a way as to exclude plaintiff from its provisions, as he contended it should be construed, than and in such case there was not occasion to burden the court with matters touching the constitutionality of the act. Indeed if plaintiff's rights were not affected by the act he was not entitled to be heard upon the question of the constitutionality of the act. Upon the District Court concluding that plaintiff had no standing in court on account of the injuries complained of apparently because all of his common law rights had been taken from

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him, plaintiff prosecuted an appeal to the Supreme Court and there again contended that if the statute was to be given the construction which apparently had been given it by the district court then and in such case the act was vulnerable to the attack that the act was unconstitutional. That the Supreme Court of Utah fully understood that the constitutionality of the act was brought in question if the act should be construed in such a way as to deny plaintiff all right to recover on account of the injuries complained of is made evidence by its opinion, a copy of which is hereto attached as Exhibit "A".

Moreover, upon the rendering of the opinion by the Supreme Court of Utah plaintiff filed his petition for a rehearing in which petition plaintiff specifically alleged: "That if the Utah Occupational Disease Act means what the court has construed it to mean then and in such case the act is in conflict with the provisions of Article 4, Section 2 and of the 5th and 14th Amendements of the Constitution of the United States."

Plaintiff filed a written brief in support of the petition for a rehearing. The petition for a rehearing was denied without opinion.

**Cases Believed to Sustain the Proposition That the Constitutionality of the Act Was Timely Raised**

The following decisions of this court are believed to sustain the proposition that the question of the constitutionality of the act was timely raised:

Where the constitutional question arises from the decision of the Supreme Court itself it may be raised for the first time on petition for rehearing.

*Great Northern Railway Co.* v. *Sunburst Oil and Refining Co.*, 53 *Supreme Court* 145; 287 U. S. 358; 77 L. Ed. 360.

The Federal question is specially set up and claimed, if it appears from the opinion of the court that it was considered and ruled upon against plaintiff in error.

*San Jose Land, etc.*, v. *San Jose Ranch Co.*, 23 *Supreme Court* 487; 189 U. S. 177, 180; 47 L. Ed. 765.

Where the validity of a state statute is drawn in question and the decision is in favor of its validity, if the Federal question appears in the record and was decided or such decision was necessarily involved in the case and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed was not conclusive against a review of such question here.

*Yazoo, etc. R. Co.* v. *Adams*, 21 *Supreme Court* 240; 180 U. S. 1; 45 L. Ed. 395; *Telluride Power Transmission Co.* v. *Rio Grande Western Ry. Co.*, 20 *Supreme Court* 245; 175 U. S. 639, 44 L. Ed. 305.

POINT TWO

An examination of the authorities shows that an employer is liable for his negligence which causes occupational diseases to employees upon the same principles as are applicable to other acts of negligence.

*Boal* v. *Electric Storage Battery Co.*, 98 F. (2d) 815; *Kane* v. *Federal Match Corp.*, 5 F. Supp. 507; *Young* v. *Salt Lake City*, 97 Ut. 123; 90 Pac. (2d) 174; *Downing* v. *Oswald Accetylene Co.*, 112 N. J. 225, 169 Atl. 709.

It will be seen that the Utah Occupational Disease Disability Act, as construed by the Supreme Court of Utah, does not base the amount of compensation that an injured employee may receive on the extent of his injury. Before

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the employee may recover anything he must be *totally disabled.* Not only that but he must receive the injury in the manner provided for in the act. In the cases of silicosis the affliction must manifest itself in the manner provided for in the act. If he suffers a 99% disability he must bear the same without redress. If he contracts silicosis and it is not of the particular kind that is defined in the act he is deprived of recovery even if he becomes totally disabled. If perchance he has worked for an employer for the designated period of ten years, but less than five years of such employment has been outside of the state of Utah he is without remedy. If the employer discovers that the employee is failing in health because of an occupational disease, all the employer need do is discharge the employee and if this is done in time so that the employee does not suffer total disability within two years the employer is relieved from all liability without regard to how negligent the employer may have been in causing the affliction. *U.C.A. 1943, 42-1a-13.*

If the law making power of a state may thus deprive an employee of all right to recover for any injury negligently inflicted by the employer then and in such case so long as such injury does not completely destroy the earning power of the employee and in the manner specified by the act there is no reason why the law making power may not likewise take from the employee all right to recover for physical injury such as the loss of his legs or other bodily function even though such injury is caused solely by the negligence of the employer. The theory upon which valid compensation laws are sustained is that a statutory right is given in lieu of a common law right. Under the construction placed on the act here brought in question a very substantial common law right is taken from the plaintiff and other employees similarly situated without substituting any other right in lieu of the right so taken away. It is contended that

such results may not be done without offending against the constitutional provisions relied upon.

**Cases Believed to Sustain the Proposition That a Federal Question Is Presented for the Determination of This Court.**

In that the state statute indicates that portion of the Fifth Amendment to the Constitution of the United States wherein it is provided that "No person shall * * * be deprived of life, liberty or property without due process of law" and that portion of the Fourteenth Amendment of the Constitution of the United States wherein it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its, jurisdiction the equal protection of the law; and also article 4, section 2 of the Constitution of the United States wherein it is provided that: "The citizens of each state shall be entitled to all Privileges and Immunities of the Citizens in the several states."

*State* v. *Cahoon*, 283 U. S. 553;

*Aero Mayflower Tea Co.* v. *Georgia Public Service Commission*, 295 U. S. 285;

*Hartford Steam Boiler Co.* v. *Harrison Insurance Commissioner*, 301 U. S. 459;

*Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476;

*Meyers* v. *Nebraska*, 262 U. S. 390, 399, 97 L. Ed. 1042, 1045; 43 S. Ct. 625;

*Truax* v. *Corrigan*, 257 U. S. 312, 327, 66 L. Ed. 254, 260; 42 S. Ct. 124;

*New York Central R. R. Co.* v. *White*, 243 U. S. 188; 37 S. Ct. 247.

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WHEREFORE, the appellant, Nick Masich, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code.

Respectfully submitted,

CLARENCE M. BECK,
WILLIAM A. HILTON,
ELIAS HANSEN,
*Attorneys for Nick Masich,*
*Petitioner and Appellant.*

## EXHIBIT A

[Stamp:] Filed Mar. 25, 1948, — — ——, Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 7048

NICK MASICH, *Plaintiff and Appellant,*

*v.*

UNITED STATES SMELTING, REFINING & MINING COMPANY, and F. S. MULOCK, *Defendants and Respondents*

LATIMER, *Justice:*

Appellant, plaintiff in the court below, commenced an action for a declaratory judgment seeking to have the court determine his rights to institute a common law action for disability from silicosis contracted by him while in the employment of the defendant, United States Smelting, Refining & Mining Company. Plaintiff, in alleging his injuries states, in substance, that he is suffering from an occupational disease known as silicosis, which he alleges not to be complicated with active pulmonary tuberculosis. It is not necessary to set forth in detail the particular acts of negligence alleged, as they, in substance and effect, charge the defendants with failure to furnish the plaintiff a safe place to work, and the specific acts are unimportant to this decision. Plaintiff further alleges that since 1935 the defendant, F. S. Mulock, has been Vice President of the corporate defendant, and the manager of the mine where plaintiff worked and that he has been in control and direction of the policy of the company and the personnel who were employed to work in the mine. Plaintiff further alleges that he is not totally disabled by the disease, and therefore disputes the defendants' contention that his sole and exclusive remedy is under and pursuant to Chapter 42-1A and particularly Section 42-1A-3, U.C.A. 1943, and the amendments thereto, and defendants' further contention that the personal de-

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fendant is not liable for the action complained of. Plaintiff alleges further facts in support of his reasons for seeking a declaratory judgment. However, in view of the fact that we have elected to determine plaintiff's rights, these other allegations are not set forth.

Defendants, in answer, deny that they were guilty of any of the alleged acts of negligence and for the most part deny the other allegations of plaintiff's complaint. They affirmatively allege that at the time suit was instituted and at the present time, Section 42-1A-3 provided an exclusive remedy against an employer for disease or injuries to health sustained by an employee and arising out of the course of his employment, and that this act precludes plaintiff from suing on his common law right. That prior to instituting this action in the district court, the plaintiff filed with the Industrial Commission of the State of Utah, his claim for compensation under the provisions of Chapter 1A of Title 42, U.C.A. 1943. That in the claim filed, plaintiff alleged he had contracted silicosis while employed by the defendants and that said claim is now pending before that commission.

The case was submitted to the trial court on the issues as raised by the pleadings and pursuant to a stipulation which provided that the only issues to be presented to the district court and to this court on appeal were as follows: (1) Does the Utah Occupational Disease Disability Law, Chapter 1A, Title 42, U.C.A. 1943, as amended, furnish the exclusive remedy of the plaintiff against the defendant, United States Smelting, Refining & Mining Company, and bar the maintenance of a personal injury suit in the district court? (2) Does the same law bar the maintenance of a personal injury action in the district court as to the defendant F. S. Mulock? We believe our holding on the first issue makes a discussion of the second question unnecessary. Because of such stipulation and because, for the purposes of this suit alone, we assume the facts alleged in the pleadings to be true, we will treat only the questions of law involved.

While many of the sections of Chapter 42-1A, U.C.A. 1943, have some bearing on the interpretation that should be given this act, it is deemed necessary to set forth only

those which are of controlling importance. Section 42-1A-3 is as follows:

"EXCLUSIVE REMEDY AGAINST EMPLOYER.

The right to recover compensation pursuant to the provisions of this act for diseases or injuries to health sustained by an employee and arising out of or in the course of his employment, whether resulting in death or not, shall be the exclusive remedy against the employer."

Section 42-1A-13 provides as follows:

"EMPLOYER LIABILITY FOR COMPENSATION—CONDITIONS WHEN NO PAYMENT TO BE PAID.

(a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled by reason of an occupational disease subject to the following conditions:

* * * * * * *

(2) No compensation shall be paid for a disease other than silicosis unless total disability results within one hundred twenty days from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

(3) No compensation shall be paid in case of silicosis unless during the ten years immediately preceding the disablement the injured employee shall have been exposed to harmful quantities of silicon dioxide (SiO2) dust for a total period of not less than five years in this state and unless total disability results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed."

Section 42-1a-28 provides as follows:

"OCCUPATIONAL DISEASES—LISTED.

For the purposes of this act only the diseases enumerated in this section shall be deemed to be occupational diseases:

* * * * * * *

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(27) Silicosis."

Section 42-1a-29 provides as follows:

"SILICOSIS—DEFINED.

For the purpose of this act 'silicosis' is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (Si02) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations."

Section 42-1a-30 provides as follows:

"ID. WHEN COMPLICATED WITH OTHER DISEASES—PAYMENTS.

In case of disability or death from silicosis complicated with tuberculosis of the lungs, compensation shall be payable as for disability or death from uncomplicated silicosis. In case of disability or death from silicosis when complicated with any disease other than pulmonary tuberculosis, compensation shall be reduced as provided in Section 51."

Section 42-1a-49 provides as follows:

"(a) If the claim is made by an employee and based upon silicosis it must be filed within one year after the cause of action arises. . . ."

If we hurriedly scan the history and development of the law of compensation in this country, we first find the legislatures and courts dealing with accidental injuries arising out of or in the course of employment. These acts covered the employee who was accidentally injured in the course of his employment, but failed to cover an employee who was rendered ill because of an occupational disease. Some jurisdictions extended the coverage of the act to include occupational diseases, but for the most part the employee suffering from an occupational disease was left to his common law right of action.

In this state the Workmen's Compensation Act was construed to involve only accidental injuries, so that when an employee suffered an occupational disease, he was confronted with the necessity of establishing actual negligence on the part of the employer and was confronted by the common law defenses then available to the employer. This court recognized that the legislature had not occupied the field of occupational diseases when the Workmen's Compensation Act was passed; and so the employee suffering from disease was limited to his common law right of action. (See Young v. Salt Lake City, 97 Utah 123, 90 P. 2d 174). The situation thus was that industry was required to share the cost of insuring the class of employees injured by accidents, while not being required to carry the burden of insuring those employees that were rendered ill because of diseases incidental to the business.

Shortly after this court decided the Young v. Salt Lake City case, supra, the legislature enacted the Occupational Disease Statute. Much of the wording of this act was taken from the Workmen's Compensation Act, and the first part of Section 42-1a-3, dealing with the exclusive remedy provision under the Disease Statute, is in all respects similar to the exclusive remedy provision under the Workmen's Compensation Act (Section 42-1-57).

The parties have exhaustively treated the interpretation of Section 42-1a-3, and each has, by transposition, made the act appear to sustain their respective contentions. We need not belabor this opinion with the respective claims, all we need do is to point out that a careful reading of the section convinces the members of this court that the wording is ambiguous and susceptible of being interpreted in the manner contended for by both parties. Such being the case, the duty of this court is to arrive at the legislative intent.

In newly enacted legislation it is sometimes necessary in order to determine the legislative intent, to scrutinize an act to the extent of dealing with or transposing a phrase, a single word, or even a punctuation mark; but no such refined scrutiny is necessary in this case. This for the reason that for many years our legislature has been dealing

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with a companion act similar in phraseology and context; the Workmen's Compensation Act has been passed on repeatedly by this court, and the legislature has been content to accept the construction placed on that act by this court. The intent, purposes and objectives of the Occupational Disease Act, which is closely allied to the Workmen's Compensation Act, can be determined by reliance on former interpretations of the Workmen's Compensation Act without searching through the refinements of construction necessary, had the former act not been before the legislature on many occasions. In addition, the legislative intent in the Occupational Disease Statutes does not depend on the correlation or arrangement of words alone. Other and different reasons can be considered. One of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject.

While it can be contended that this court has never directly passed on the exclusive remedy provision of the Workmen's Compensation Act, many decisions have indicated that the act operated on the employer-employee relationship, and that co-existent with this change was an abrogation of the employee's common law right to sue the employer for any and all injuries suffered while in the course of his employment, except in those cases where the employer was not subject to the act or the common law remedy of the employee was expressly reserved by the act. In addition to the decisions that will be hereinafter referred to, the bench and bar of this state have for many years assumed that the employee has no right of action for physical damages suffered in the course of employment, even though the statutes made no award for the injury, and the employee had no remedy. Notably present in this class is lack of a remedy to recover for pain and suffering.

In the case of Peterson v. Sorensen, 91 Utah 507, 65 P. 2d 12, an employee commenced an action in the district court for injuries sustained when he fell into an elevator pit. The employer had not complied with the requirements of the act in that he was not carrying compensation and had not

qualified as a self-insurer. Under the statute this failure to meet the requirements of the act permitted plaintiff to commence an action in the trial court. Mr. Justice Moffat, speaking for the majority of the court said, at page 514 of 91 Utah Reports, page 16 of 65 P. 2d:

> ". . . . *an action as known to the common law by the servant against the master for an injury sustained by the former no longer exists in this state. That such is the law when the master complies with the Workmen's Compensation Act in the matter of carrying insurance may be conceded.* The injured employee is not, however, deprived of his common-law right of action against a non-complying employer . . ." (Italics added).

Again in the case of Halling v. Industrial Commission, et al., 71 Utah 112, 120, this court, speaking through Mr. Justice Hansen, stated:

> "It will not be necessary to here consider the other provisions of the Workmen's Compensation or Industrial Act, except to observe that in the instant case the applicant must recover, if at all, the compensation provided for in such act. Under the provisions of Laws Utah, 1921, c. 67, Par. 3132, *it is only in the case of an injury caused by the employer's willful misconduct that an injured employee, or in case the injury results in death, his dependents, may recover damages in an action at law for a wrongful injury. When the injury is caused merely by the negligent act of the employer, the injured employee,* or when the injury causes death, his dependents, *must be content to accept the compensation provided for by the act. . . .*" (Italics added).

In the case of Shurtliff v. Oregon Short Line R. Co., 66 Utah 161, 173, the question involved the application of the Idaho Workmen's Compensation Act. Mr. Justice Straup, speaking for the court, stated:

> ". . . But it is also true that a court will administer and apply the law of the forum or jurisdiction until the law of the situs is shown, sometimes expressed that

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in the absence of proof it will be presumed that the law of another state is the same as the law of the forum, and in this jurisdiction, as in many others, the presumption is extended to statutory, as well as to common, law. Grow v. Railroad Co., supra. Under the statutes of this state, Comp. Laws Utah 1917, Par. 3132, and as amended by Laws Utah 1921, p. 175, known as the Workmen's Compensation Act of this state, *redress against an employer for personal injury of his employee not employed in interstate commerce must be had in pursuance of such statute, which remedy in such case is by the statute made exclusive. . .*" (Italics added)

In the case of Murray v. Wasatch Grading Co., 73 Utah 430, 435, 274 P. 940, this court, speaking through Mr. Justice Hansen, said:

> "Since the enactment of the Workmen's Compensation Act in 1917, *the exclusive remedy of an employee who is injured in the course of his employment is the right to recover the compensation provided for in the Act,* Comp. Laws Utah 1917, Par. 3132, as amended by Laws Utah 1921, p. 175 . . ." (Italics added)

This court again in the case of Robinson v. Union Pac. R. Co., 70 Utah 441, 261 P. 9, treated the subject of the exclusive remedy of the employee. That case involved an employer's right to recover from a third party for injuries occasioned to the employee while working on the premises of the employer. The interpretation of Section 3132, Compiled Laws of Utah, 1917, which is now 42-1a-57, U.C.A. 1943, was discussed. The prevailing opinion in discussing the rights an injured employee might have, reads the phrase "against his employer" into section 3133, 1917 Compiled Laws of Utah, so that the section then read: "If an employee under this act be injured or killed while in the course of his employment by another not in the same employment, he or his dependents in case of death, shall be entitled to compensation and *no other remedy against his employer unless . . .* " The legislature in effect ap-

proved this holding by amending the section and giving the employee or his heirs an option to either take compensation or proceed against the third party. (Italics added)

The concurring opinion of Mr. Justice Straup, however, deals more specifically with the problem. Said he, at page 13 of 261 Pacific Reports:

> "The question thus is, is our statute as broad and comprehensive as is the Washington or Montana statute? I think not. That, I think, is evident by comparing our statute with that of either of such statutes. Our statute (section 3132), heretofore referred to, provides that 'the right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or otherwise, shall be the exclusive remedy against the employer', except where the injury is caused by the employer's willful misconduct, etc. It is clear that such language is not as broad or as comprehensive as that contained in either the Montana or the Washington statute. In such respect our statute says that the right to recover compensation pursuant to the provisions of the title 'shall be the exclusive remedy against the employer', while the Washington statute says that it shall be exclusive as to all persons, and that payment made thereunder 'shall be in lieu of any and all rights of action whatsoever against any person whomsoever' not only as against the employer as section 3132 provides, but as 'against any person whomsoever'."

That our legislature when it occupied the accidental injury field intended to entirely abrogate an employee's right to sue an employer who had complied with the provisions of the act, for any and all injuries suffered by the employee while in the course of his employment is further evidenced by another provision of the original act passed in 1917. When this act was passed, Article 16, Section 5 of the Utah Constitution prohibited the legislature from abrogating the right of action to recover for death. This was later amended, but in order not to offend against the

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constitutional provision, then in existence, Chapter 100, Section 66, Laws of Utah, 1917, provided:

> "Employers who comply with the provisions of Section 53 of this act *shall not be liable to respond in damages for injuries sustained by their employees not resulting in death.* For injuries, however, resulting in death, the dependents of the deceased employee are given the right, within such time as the commission by rule shall prescribe, to elect (a) between bringing suit at law against such employer to recover damages for such death and in the event of suit said dependents must prove negligence on the employer's part before they can recover, or (b) to accept the benefits allowed to dependents of deceased employes by this Act in the event of death. *If they elect (b) they shall not be entitled to sue such employer at law to recover damages.* If they elect (a) they thereby forfeit any rights to compensation under this Act and in a suit at law shall not be entitled to recover damages from such employer if the deceased employe was himself guilty of contributory negligence, or if he assumed the risk, or if his death was due in whole or part to the negligence of a fellow servant . . . " (Italics added)

Section 53 refers to employers who have provided compensation. It will thus be observed that when an employer had qualified under the act, the legislature clearly expressed an intention to eliminate the common law action of an employee against the employer for injuries suffered by the employee, and to place the administration of the rights and remedies granted by the act in the hands of an administrative agency where the purposes of the legislation could be more expeditiously carried out. This provision denied the employee the right to bring a suit against his employer without regard to the compensability of the injury. Aside from the instances where the act itself created exceptions, it was not intended to divide the relationship so that if the compensation act failed to give complete redress, the injured employee could still resort to the courts to supplement the

remedies given by the act. The same principles apply to the Occupational Disease Act.

Cases from many other jurisdictions could be cited wherein the courts of last resort have interpreted similar Workmen's Compensation Acts to have abrogated the employee's right to maintain an action at common law, even though the respective acts are not all-inclusive on every element of damages. Rather than make reference to all, we have elected to refer to the holdings of the Minnesota and California courts.

While the Minnesota act is not similar in wording to our statute, as it does not make compensation the exclusive remedy against the employer, the reasoning applied by the Supreme Court of that state is in keeping with that of most of the other jurisdictions. In the case of Hyett, v. Northwestern Hospital for Women and Children, 147 Minn. 413, 180 N.W. 552, 553, the Supreme Court of that state held an employee could not maintain an action for injuries for which no compensation was provided. In that case the employee sustained an injury to his pubic nerve, totally destroying the functions thereof, and rendering him permanently impotent. Finding no remedy under the Compensation Act for the particular injury, the employee instituted an action at law to recover damages.

> "That the remedy so given and provided is exclusive of all others seems to be the prevailing opinion of the courts where the question has received attention. Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N.E. 795; Gregutis v. Waclark Wire Works, 86 N.J. Law 610, 92 Atl. 354; Peet v. Mills, 76 Wash. 437, 136 P. 685, L.R.A. 1916A, 358, Ann. Cas. 1915D 154; King v. Viscoloid Co., 219 Mass. 420, 106 N.E. 988, Ann. Cas. 1916D, 1170. Connors v. Senet-Solway Co., 94 Misc. Rep. 405, 159 N.Y. Supp. 431, in which it was said that Shinnick v. Clover-Farms Co., 169 App. Div. 236, 154 N.Y. Supp. 423, holding to the contrary had been overruled by Jensen v. Southern Pacific, supra. If the case was not in effect there overruled it clearly was so disposed of by the later decision of the Court of Ap-

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peals in the Shannahan Case above cited. The case of Boyer v. Crescent Paper Co., 143 La. 368, 78 South. 596, takes the other view of the Louisiana Compensation Act and supports plaintiff in the case at bar. But to follow that rule would in a large measure be destructive of the main purpose and scheme of the statute, and deprive the employer of a right expressly granted him in return for his concession of liability for the non-actionable injury. It would result also in opening wide the door to double litigation in a great majority of the compensation cases. With the opportunity presented the discovery of negligence in some respect contributing to a particular injury would not be difficult, and thus the employer exposed to a second suit in which recovery could be had for pain and suffering, disfigurement of person, in addition to a recovery of compensation for actual disability under the Compensation Act. A personal injury received at the hands of a wrongdoer constitutes but one right of action. It cannot be divided into several parts to accord with the elements of damages recoverable therefor. It presents a single controversy to be settled in a single action. Dunnell's Dig. 5167. That is elementary, and it is manifest that there was no intention on the part of the legislature to change or abrogate it by the Compensation Act; and no such intention should be presumed by the court. On the other hand, it is clear that the intention of that body was to present to the employers and employees of the state a comprehensive act embracing their exclusive rights and remedies for accidental or other injuries suffered by the employee. Morris v. Muldoon, 190 App. Div. 689, 180 N.Y. Supp. 319. If the compensation so provided is deemed inadequate, or that the act should be made to include all or any of the common-law elements or ingredients of relief found in the negligence law, the change should come about by legislation and not by rule of court."

In 1917 the legislature of the State of California repealed certain provisions of the Workmen's Compensation Act

then in force, and enacted Chapter 586, Statutes and Amendments to the Codes, 1917. Section 6(b) of the new act provided as follows:

> "Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death; . . ."

The Supreme Court of California in the case of Alaska Packers' Association v. Ind. Acc. Comm., et al., (Cal.), 253 P. 926, 928, interpreted the exclusive remedy provision of the act. The opinion contains the following statement:

> "The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. Netherlands American Steam Nav. Co. v. Gallagher (C. C. A.) 282 F. 171, 183. The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages. Cooper v. Industrial Acc. Comm., 177 Cal. 685, 687, 171 P. 684. It substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 692, 151 P. 398. When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common-law remedies. De Carli v. Associated Oil Co., 57 Cal. App. 310, 207 P. 282."

In passing to Section 42-1a-3, the Occupational Disease Statute, attention is again directed to the fact that the wording used by the legislature is exactly the same as the wording used in the Accidental Injury Act, Section 42-1-57. This court, prior to the enactment of the Occupational Disease

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Statute, having construed the provisions of the Compensation Act to have abrogated the common law rights of employees, we see no reason to place a different interpretation on the same provision of the Occupational Disease Act unless the legislature by clear and unmistakable language has indicated a contrary interpretation. We find no such language in the statutes.

Sutherland on Statutory Construction, Horack's 3rd Edition, Para. 4501, quotes the following principle on the intention of the legislature:

> ". . . 'And then the office of all the judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act pro bono publico.' "

With this principle to guide us, we analyze the effect of the two interpretations of the Diseases Act, as suggested by counsel for the respective parties. The first is that the legislature intended to divide silicosis into at least two stages of development and make compensation the exclusive remedy for total disability, and permit the employee to pursue his common law right of action when partially disabled. The second is, the legislature occupied the field of those diseases enumerated in the act and as to those diseases the Occupational Disease Statute furnishes the exclusive remedy and no common law remedy is available to the employee.

If we were to adopt the first construction contended for, we would not only upset what has been long regarded as the law of this state in the accidental injury field, we would further render the Occupational Disease Act so confusing, uncertain, and impractical that proper administration would be almost impossible. The courts would have jurisdiction to hear and determine all controversies on all diseases when the employee had not reached total disability, and then upon reaching this stage, jurisdiction would be transferred to the Industrial Commission. Causes of action would be

split without adequate procedure to prevent the employer from being liable for double damages. If an employee could not meet the other requirements provided in the act, he could still resort to his remedy through the courts. An employee totally disabled would be limited in the amount he could recover because the maximum payable is limited by the terms of the act. Yet the partially disabled employee would only be limited by the conscience of the jurors. In many proceedings brought before the commission, efforts would be made by the employer to establish partial disability, to throw the employee back to his common law remedy and in many actions in the district court, efforts would be made to show total disability, to throw the action back to the commission. Neither tribunal nor commission could be certain as to which had jurisdiction. Without detailing all of the difficulties to be encountered were such an interpretation rendered, enough have been mentioned to indicate that one of the beneficent purposes of such acts, to avoid litigation, lessen expense thereof, and afford an efficient and speedy tribunal to determine and award compensation, would be thwarted.

The duty of a court to avoid a construction that will result in confusion or uncertainty is a duty recognized by all. The general rule in this regard is stated as follows, in 50 Am. Jur., Statutes, Par. 382:

> "In the interpretation of statutes, a court should be astute in avoiding a construction which may be productive of much litigation and insecurity, or which would throw the meaning or administration of the law, or the forms of business, into hopeless confusion or uncertainty. Indeed, it has been declared that statutes should never be given a construction that leads to uncertainty or confusion, if it is possible to construe them otherwise. Hence, an interpretation should, if possible, be put upon the provisions of a law which will permit the officials having the responsibility for its administration to proceed in an orderly manner. A particular construction will also be favored where it appears to be the only one which will afford a fixed, permanent, and certain rule to ascertain whether a particular case is

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included within or excluded from the operation of the statute. Similarly, where the construction of a statute involves a choice between uncertainties, the lesser should be chosen. However, where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory construction."

Can we from the provisions of the act find support for the second interpretation set forth above? Section 42-1a-28, in enumerating the diseases deemed to be occupational, specifically sets forth silicosis. Section 42-1a-29 defines that disease, and Section 42-1a-30 provides that when it is complicated with tuberculosis of the lungs, compensation will be as provided for silicosis, and when it is complicated with other diseases, compensation shall be reduced. Other sections deal with the requirements for total time of exposure to silicon dioxide dust, the length of time the employee must have been so exposed in this state, which employer is to be charged with payment of compensation if there has been more than one employer, and finally the time within which total disability must arise. These requirements, together with those included within other provisions of the act, indicate not only that the legislature intended to completely occupy the field of those occupational diseases enumerated in the act, but also indicated that silicosis was so thoroughly considered by the legislature and so completely dealt with in the act itself, that it can be said that the legislature did intend to fully deal with both the right and the remedy of the employee suffering from silicosis. The act grants to the employee the right to recover compensation from the employer regardless of fault on the part of the latter, but prescribes certain standards that must be met by the employee before an award can be made. One of these standards is that the employee must be totally disabled. Until he reaches that stage, his injuries are not compensable. By limiting liability to total disability, the legislature excluded liability for partial disability, but in so doing it did not indicate an intention to reserve the common law right of action during the period of partial disability. There may be many reasons why the legislature considered the pay-

ment of compensation for partial disability to be impracticable. In setting up a practical method of imposing liability on the employer, the legislature was faced, in the case of silicosis, with dealing with a continuing and progressive disease that could be contracted while working for one employer and aggravated by conditions encountered while the employee was working for other employers. During these periods of different employment, the employee's degree of disability might be gradually increased. If a cause of action were to be split, the partially disabled employee would be required to pursue his common law remedy against each of the employers for whom he had worked. When he became totally disabled, his condition would not be the sole responsibility of the last employer; it would be chargeable against all employers who, through their negligence, had contributed to his illness.

Even conceding that a law which would fasten liability on each employer could be satisfactorily enforced so that each subsequent employer would be required to contribute a certain part of the sum awarded to the injured employee, it would seem more consistent with our procedure that had the legislature so intended, the administration of such an act would be placed with the Industrial Commission and not left with the courts. Such a procedure could be much more expeditiously handled by an administrative agency. The passage of the Occupational Disease Act shows that the legislators were cognizant of the fact that employees suffering from occupational disease were at a disadvantage in the courts, and that in order to afford them some reasonable protection, it was necessary to take the adjudication of the rights and remedies from the courts and place them under control of the commission, where those rights could be protected and the remedies efficiently administered. If such reason prompted the legislature to so deal with the rights and remedies of a totally disabled employee, it would be hard to understand why the legislature would leave the partially disabled person to his doubtful legal remedy when by so doing, it would muddle and confuse rights, remedies, and forums, so as to defeat the very purposes of the act.

Had the legislature intended to permit the partially disabled employee to proceed against his employer, it would

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have been simple and easy for the legislature to have so stated. A plan similar to the one adopted by the Province of Ontario could have been provided for. This plan is described in Kessler's *Accidental Injuries*, (1931) p. 646. Under that system, the disease of silicosis was divided into three stages, as follows: (1) Ante primary silicosis; (2) Primary silicosis; and (3) Secondary stage of silicosis. The individual who was awarded compensation for ante primary silicosis recovered $500, those awarded compensation for primary silicosis, $1,000, and those considered in the secondary stage received ⅔ of their wage for life. This latter classification was considered as both serious and totally disabling.

The states of Pennsylvania and New York have construed their statutes dealing with the remedies of an employee when the disease from which he is suffering is scheduled in the act. The acts of both those states have the following provision: "Compensation shall not be payable for partial disability due to silicosis." Our act does not include this wording, but by making compensation payable only in the event of total disability, it clearly indicates an intent on the part of the legislature not to make compensation payable for partial disability.

In the case of Moffett v. Harbison-Walker Refractories Co., 339 Penn. St. Repts. 112, decided 1940, the Pennsylvania Supreme Court construed the Pennsylvania act thus, at page 117:

> "In construing the statute, which is all that is now involved, we are hardly assisted by cases from other states unless they construe substantially similar provisions. Plaintiff's brief asserts that 'The weight of authority is against defendant's position,' and cites cases from other jurisdictions, of which our own case, Billo v. Allegheny Steel Co., 328 Pa. 97, 195 A. 110, may fairly be said to be an example. *That case arose and was decided before the statute brought occupational disease under the act.* The decision was that a plaintiff could sue in tort for silicosis; it was a disease not made the subject of the compensation legislation; no other result could have been reached. But neither that case,

nor any that we have seen, would justify a construction of our statute in accord with plaintiff's contention. *We have examined the cases cited in plaintiff's brief and reject the statement that the weight of authority is against defendant's position.* The cases are simply not in point. There is one case, and so far as we have found, only one, in which the compensation statute deals with silicosis and distinguishes between partial and total disability; in that one the court concluded that the legislature dealt with the whole subject and held there could be no recovery outside the provisions of the act; it is a decision of Harris, J., in New York, DelBusto v. Dupont deNemours & Co., Inc., 167 Misc. 920, 5 N.Y.S. 2d 174 (Sup. Ct. 1938). This case supports the view of the appellee." (Italics mine.)

The Supreme Court of New York, in the case of DelBusto v. Dupont deNemours & Co., supra, upheld the contention that the employee who was only partially disabled had no recourse at common law. The author of the opinion said at page 177 of 5 N.Y.S. 2d:

> "This court is of the opinion that in enacting that portion of Par. 66, Art. 4a of the Workmen's Compensation Law (citing the statute) which provides 'compensation shall not be payable for partial disability due to silicosis or other dust diseases' the legislature determined that in compelling the employee to bear the burden of partial disability it was a burden that he should, in accordance with the constitution, be compelled to bear in return for the compensation allowed him for total disability or death from silicosis or other disease. . . ."

This case is particularly interesting as it was rendered after the case of Barrencotte v. Cocker Saw, 269 N.Y. 139, which permitted an employee suffering from silicosis to maintain an action under his common law right of action. The development of the law in the state of New York was substantially as we indicate. Prior to 1935, the Workmen's Compensation Law made no provision for the payment of

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compensation for disability, partial or permanent, due to silicosis. In the Barrencotte case, supra, an action was brought to recover damages at common law for injuries due to silicosis sustained as a result of the employer's negligence. The court of appeals held that the New York legislature had intended to bar actions at common law only in the field within which it created liability or obligation to provide compensation for injury or disability, regardless of fault. Since silicosis was not scheduled as an occupational disease, the court of appeals held those who suffered were free to bring an action at common law. The following year the act was amended to include any and all occupational diseases. In 1936 silicosis was made the subject of a separate article, and in 1938 the DelBusto case was decided.

The DelBusto case seems to me to be on all fours with the present action, particularly in view of the development of the law in the state of New York. Admittedly, the Supreme Court of New York is not the court of last resort in that state, but other cases have attempted to have the court of appeals upset the ruling of the DelBusto case. As far as we have been able to determine, those attempts have not met with any success.

In the Powers v. Porcelain Insulation Corporation case, 285 N.Y. 54, the Court of Appeals refused to pass on the constitutionality of the New York act because questions other than the validity of the challenged statute were presented. Again, in the Scherini v. Titanium Alloy Co. case, 37 N.E. 2d 237, the Court of Appeals refused to upset the law on procedural grounds, although one justice wrote a dissenting opinion in which he asserted the act violated both the Constitution of the state of New York and the 14th Amendment of the Constitution of the United States.

In 1946, the New York court in the case of Soporito v. Hetzler Foundries, Inc., 269 App. Div. 962, 57 N.Y.S. 2d 838, again had occasion to deal with the New York act. In that case the employee claimed to have suffered injuries to his circulating and cardiac system because of having had to work in rooms polluted with gas and fumes. The complaint alleged that the plaintiff's injuries were not accidental injuries or occupational diseases such as to bring him

within the coverage of the Workmen's Compensation Law. The Supreme Court denied a motion to dismiss the complaint based on the contention that plaintiff's sole remedy was by a proceeding under the Workmen's Compensation Law. The Court of Appeals affirmed the order of the Supreme Court. While the decision does not so indicate, the ruling is consistent with prior rulings of that court to the effect that if a disease is not scheduled, then the employee still has his right to pursue his common law remedy. Had our legislature not scheduled silicosis, then the authorities cited by appellant would be in point.

Counsel for appellant has cited many cases dealing with legislative intent in enacting both accidental injury and occupational disease statutes. Among the cited cases are the following: Jones v. Rinehart & Dennis Co., 113 W.V. 414, 168 S.E. 482; Downing v. Oxweld Acetylene Co., 112 N.J.L. 25, 169 A. 709; Gentry v. Swann Chemical Co., 234 Ala. 313, 174 So. 530; Rosenfield v. Mathews, 102 Minn. 113, 275 N.W. 698; Triff v. National Bronze Co., 135 Ohio St. 191, 20 N.E. 2d 232; Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972; Donnelly v. Minneapolis Mfg. Co., 161 Minn. 241, 201 N.W. 305; Dalton Foundries Inc. v. Jefferies, 114 Ind. App. 271.

These cases can be divided into three general groups, and for the most part we agree with the conclusions reached. However, they are not in point. Some of the cases hold that when the legislature has not occupied the occupational disease field, the employee suffering from a disease contracted or aggravated by the employer's negligence is not precluded from bringing his common law action. This is consistent with our holding in Young v. Salt Lake City, 97 Utah 123, 90 P. 2d 174. Another group holds that when the legislature enacts an occupational disease law it only occupies the field to the extent of the enumerated diseases. These cases would be in point, had silicosis not been enumerated in our act. The last of the three groups deals with the rights of employees to bring suits based on a right of action arising before enactment of the particular statute. Obviously when an act excludes causes of action arising before the act is passed, no valid reason exists for denying the employee

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his right of action for the injuries sustained before passage of the act.

We have concluded that the legislature occupied the complete field of silicosis and that under the facts alleged in this case, Section 42-1a-3 bars plaintiff from maintaining this action. We now consider the question of whether or not the act is unconstitutional because it fails to provide compensation for a partially disabled employee. The contention is made that if a partially disabled employee is not granted compensation and, further, is denied his common law right of action then he has been deprived of his remedy by due course of law for an injury done to his person, contrary to the provisions of the Constitution of this state. There are two provisions of our Constitution which have been interpreted in Workmen's Compensation litigation. Section 5, Article XVI, which involved the right to sue for wrongful death, is no longer involved so we are now only concerned with Section 11, Article I, which provides:

> "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

One of the first compensation acts tested for constitutionality was the New York act, enacted in 1910. In Ivis v. South Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 931, the New York Court of Appeals struck down this act as being unconstitutional. Not until the year 1917, when the U. S. Supreme Court in the case of New York Central R.R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, held compulsory workmen's compensation act constitutional was the uncertainty removed. The basis for holding such acts constitutional is that the state under its police power has the right to require industry to make compensation for the damage which the industry itself causes.

The constitutionality of compensation acts is too well

settled to be now questioned, and is referred to solely for the reason that this case involves a problem not usually presented in this type of case. Here we have a claim that the act, if construed to involve no compensation for partially disabled employees, is unconstitutional because it does not go far enough in providing remedies to injured employees. Had the act provided some measure of compensation for partial disability, then the claim of unconstitutionality could not have been raised, as the employee would have had a redress for the wrong.

It may be that by reference to objections raised to the constitutionality of the act and the answers to the objections, we can find reason for the right of the legislature to enlarge, limit, or abrogate the rights or remedies of injured employees.

It has always been contended by employers that the act offended the due process clause because it abolished certain defenses such as contributory negligence, fellow servant, and assumption of risk, and by the employee because it abolished the common law right of action for negligence. The contention has been overruled because no one has a vested right in any rule of law. A statutory right can be taken away and it may vest the individual with a right as sacred and important as one existing under common law principles. Many states must have held that both statutory rights and common law rights can be taken away, otherwise, there can be no question that acts which abolish actions for seduction, breach of promise, criminal conversation, and alienation of affections, would be unconstitutional.

Assuming the legislature can abolish the common law right of action for negligence, must it return a substitute right to each and every employee in some way affected by the abrogation to meet the test of constitutionality? If the legislature were to abolish all compensation and all common law rights for negligence of an employer, no contention could reasonably be made that it was a proper exercise of the police power. The reverse would be true and pauperism with its concomitants of vice and crime would flourish. However, if the main purpose of the act is to assess the costs of injury and disease against the industry, the welfare

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of the employee is improved and the act is constitutional. The fact that under the act certain of the employees are denied their common law right, and at the same time only given compensation conditioned upon reaching a stage of total disability, does not offend against the Constitution as certain individual rights and remedies can be made to yield to the public good. The humanitarian principles of the occupational disease act do overcome, in part, the inadequacy of relief at common law for a class of employees, and the act should not be discarded because some members of the class have rights which may be adversely affected.

It should be remembered that our act is a compulsory act and should be considered in the light of the principal that the employer is charged with liability regardless of fault, when the employee is totally disabled or deceased, and therefore need not also be subjected to the employee's common law right of action for negligence during the time the employee is partially disabled. This would, in effect, permit the employee to retain his common law right and then, upon reaching disablement, grant him an additional right. Such a rule would grant the employee two remedies for one wrong. If the legislature can deny the right to rely on the defense of contributory negligence and assumption of risk, and make the employer absolutely liable regardless of fault, then we believe it also has the right to say that compensation shall not be awarded until the employee has brought himself within the terms of the statute.

There must have been some reason for the legislature to limit the compensation to those employees who are totally disabled and to the dependents of those who are deceased. We are not of the opinion that the legislature intended to deny compensation to partially disabled employees and to deny them enforcement of their common law right without reason or just cause. Neither are we of the opinion that the legislature intended to preserve their common law right when it was well aware of the abuses that had brought about occupational disease legislation and the confusion that would exist if the degree of disability controlled the forum. We are convinced the legislature, because of the nature of the disease, the length of time for development, the difficulty

of proof, the inability to properly apportion the negligence between employers, the cost and expense of litigation and the small return to the employee, decided to deal with silicosis through the commission and to require both the employer and the employee to shoulder part of the costs of occupational disease without regard to the negligence of either. The employee to share the burden during partial disability, and the employer when disablement or death occurred.

This court cannot ignore or strike down an act because it is either wise or unwise. The wisdom or lack of wisdom is for the legislature to determine. If the act is unjust, amendments to correct the inequities should be made by the legislature and not by judicial interpretation. Years of study and millions of dollars have been spent on research and study of silicosis, and the legislature is able to profit by these efforts when considering legislation on the subject. If after considering the reasons for and against a bill, the legislature enacts it into law, arguments for correction of any claimed inequities should be addressed to the legislature where they can be considered and if found to exist, be corrected.

The judgment is affirmed, with costs.

We concur:

ROGER I. MCDONOUGH,
*Chief Justice;*

EUGENE E. PRATT,
*Justice.*

WOLFE, *Justice:* (Concurring)

I concur with the opinion of Mr. Justice Latimer and in the reasons given therefor. In doing so, I am not unaware that it may visit a hardship on an employee who has had his strength and ability largely but not totally impaired by the negligence of an employer in failing to use modern technological methods for keeping down silicon dioxide dust, in that he must continue to drag himself to work until he can no longer work at all. And in saying this, I have in mind a hypothetical case. We have no evidence of what the conditions were in the plant of the defendant. For aught we know

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they may have been as perfect as science and invention could make them.

As the prevailing opinion points out, this disease is a slowly progressive one. If our Occupational Disease Disability Law left open to the courts a cause of action for partial disability due to an occupational disease named in the schedule, could the plaintiff return again or perhaps again and again and recover for successive increments of disability due to the conditions under which he worked? It would seem as is pointed out in the prevailing opinion that had the legislature wanted to provide for successive increments of disability short of total disability, common sense would have caused it to place such recourse in the Industrial Commission where the applicant's progress could be watched and registered from time to time rather than in courts of law (and there might be invoked the jurisdiction of several courts in one progressive case) not practically equipped for such business. I am impressed with the fact that from a standpoint of common sense and practicability alone, the legislature must have intended to make the Industrial Commission the sole tribunal for the handling of occupational diseases.

I do not understand that Article I, Sec. 11, of the Constitution of Utah, prohibits the modification or even the entire removal or destruction of a common law right by legislative enactment. There is still such a thing as *damnum absque injuria*. I need express no opinion as to those injuries based on rights respecting person, property or reputation which under the pressure of the growth of the enlightened conscience of mankind have become a part of the common law. Much of what was said in the concurring opinion in the case of McGrew v. Ind. Comm., 96 Utah 203, 85 P. 2d 608, in respect to the motivating force of that factor as to social legislation has application to the common law. And I think this process is still operating. I see no reason why the common law which recognized rights, duties and liabilities to meet the conditions of a certain period may not later recede from those or modify them if the needs of the people require that. Naturally most departures from the common law, especially if marked, will be made by the legislature, but judicial legislation (and such it is regardless of what

jurisprudencial terminology may be employed) fills the interstices in a more gradual process. I must agree with Mr. Justice Wade that the legislative intent as expressed by the constitutional and statutory provisions and the surrounding facts and circumstances must always be the determining factor in this question. But I agree with Mr. Justice Latimer that by such test the legislature did intend in this case to abolish any right to recover at the common law for partial or total disability due to silicosis resulting from negligence of the employer. I do not think the intent to abolish the common law right must be shown by a specific statutory provision, nor do I think that every element of damage, such as pain and suffering, as they existed in the common law, must be specifically abolished or else considered as having been preserved. Where the scheme enacted by the legislature is of such a nature as to make highly incongruous and impracticable certain other asserted additional or piecemeal remedies, there may be inferred an intent by the legislature to abolish them.

If the situation is such that the claimed common law right when placed against the provisions of the act is shown to be untenable, and resort to different tribunals would introduce such confusion, uncertainty, incongruity and impracticality of remedy and of the operation and administration of the act that it must be inferred that the legislature intended to make the substituted rights to compensation the sole rights and the substituted tribunal the sole tribunal for resort, then the inference is tantamount to a specific provision. Union Portland Cement Co. v. State Tax Commission, — Utah —, 170 P. 2d 164, on rehearing 176 P. 2d 879.

WADE, *Justice:* (dissenting)

I dissent.

The facts and issues are largely as stated in the prevailing opinion. However, I call attention to the fact that there is no contention that under the facts alleged plaintiff could not recover his damages for defendants' negligence in a common law action if he is not precluded therefrom under the exclusive remedy provision of the occupational disease act, nor is there any claim that he is entitled to recover com-

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pensation under that act. The parties agree that if plaintiff were entitled to recover under the occupational disease act that would be his exclusive remedy. Thus the only question presented as far as the corporate defendant is concerned is: Does the occupational disease act preclude plaintiff from recovering damages in a common law action under the facts alleged where no compensation is provided therein for the injuries which he has sustained?

The overwhelming weight of authority in occupational disease and workmen's compensation cases is that the remedy provided in such acts is the exclusive remedy only in cases where compensation is provided for thereunder. Such acts do not preclude an employee from recovering damages caused by the negligence of his employer in a common law action in cases where no compensation is provided for the injury sustained by the employee under the act. Mably & Co. v. Lee (1934) 129 Ohio St. 69, 193 N. E. 745, 100 A.L.R. 511, and annotation at page 519; Jones v. Rinehart (1933) 113 W. Va. 414, 168 S.E. 482; Triff v. National B. & A. F. Co. (1939) 135 Ohio State 191, 20 N.E. (2) 232, 121 A.L.R. 1131, annotation at page 1143. The first Ohio case above cited held contrary to the weight of authority but was reversed in the second one. In accord with the weight of authority as to the workmen's compensation act is Young v. Salt Lake City (1939) 97 Utah 123, 90 P. 2d 174, this case will be discussed later.

The fact that the weight of authority is that way is not conclusive on that question. The law of each state is based on a different statute, and some states have constitutional provisions thereon. While these statutes of the various states, in a general sense, were enacted to accomplish the same purpose and cover about the same subject matter there is little uniformity in their wording. So the decision of one state under its statutory and constitutional provisions may have little bearing on this question under the different provisions in another state. In some states the provisions of the workmen's compensation act are so different from those of the occupational disease act that a different result may be required. The legislative intent as expressed by the constitutional and statutory provisions and

the surrounding facts and circumstances must always be the determining factor on this question. In determining such intent courts must take into consideration the purpose of the act and the public policy as expressed by the statutory and constitutional provisions and the surrounding facts and circumstances. See Annotation in 100 A.L.R. 519, and cases therein cited.

In construing the statute it must be kept in mind that under the common law system there is firmly established a strong public policy based on justice and equal rights to all, that there shall be no wrong without a remedy therefor. That such policy is not satisfied by granting compensation to a larger class of persons who could not recover for injuries sustained under the common law, but depriving others who could have recovered at common law of both compensation and their right to recover at common law. Such policy is so firmly entrenched in our system that the courts will not construe a statute as being contrary thereto unless required to do so by the clear and unambiguous provisions thereof and that in determining the public policy of the state as established by a legislative enactment the courts will keep in mind this just and equitable policy and will not construe a statute as establishing a contrary one unless the legislative enactment so provides in unmistakable terms. So under the workmen's compensation and occupational disease statutes the courts have universally refused to construe a statute so as to deprive an employee, who is injured through the negligence of his employer, of his common law right to recover damages in cases where no compensation for his injuries are provided except where the statute is clear and unmistakable that such was the policy and intention of the legislature.

In Downing v. Oxwell Acetylene Co. (1933) 112 N.J.L. 25, 169 A. 709, affirmed 113 N.J.L. 399, 174 A. 900, the court said in 169 A. page 712:

> ". . . It is not to be presumed that the Legislature intended to deprive the injured workman of his common-law remedy, in the event that he suffered, as a result of the negligence of his employer, an occupational disease not specified in the Compensation Act.

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Such an intention must be expressed in clear and unequivocal language. The term 'compensation' should not be construed to embrace damages recoverable for breach of a common law duty, unless that legislative purpose is indubitably expressed."

In Jones v. Rinehart, (1933), 113 W. Va. 414, 168 S. E. 482, in 113 W. Va. p. 425, it was said:

". . . It must not be deemed that such right of action is taken from employees unless the statutory language is clear and concise and not subject to any other reasonable construction. It is difficult to perceive a satisfactory and reasonable basis for exemption of employers from liability for disease caused by their negligence, such disease being non-compensable under the compensation statute."

In Gentry v. Swann Chemical Co., 234 Ala. 313, 174 So. 530, speaking of this subject the court said in 174 So. page 534:

"However, in the light of the provisions of Section 13, of the Constitution of 1901 'That all courts shall be open; that every person, for any *injury* done him, in his lands, goods, *person*, or reputation, shall have a remedy by due process of law' it cannot be said that for an injury done a person, not within the provisions of the Workmen's Compensation Act, that it was the legislative intent by the enactment of said law, to deny such person a remedy, . . ."

Section 11, Article I, of the Constitution of Utah, is similar to that quoted by the Alabama court and therefore should be taken into consideration in determining the legislative intention.

In Rosenfield v. Matthews, 102 Minn. 113, 275 N. W. 698 on page 699, the court said:

". . . The general rule is that: 'Where an injury does not fall within the workmen's compensation act, the common-law remedy is not affected by it . . .' 71 C. J. page 1484, Section 1493. Our own cases are in accord and so hold. In Donnelly v. Minneapolis

Mfg. Co., 161 Minn. 240, 243, 245, 201 N.W. 305, 306 the court said: 'The statute is a substitute for the common law on the subject which it covers and so far as it goes. But it does not affect rights and wrongs not within its purview or which by implication or express negation are excluded. . . . Courts are not permitted by construction to carry a statute, particularly one in derogation of the common law, beyond its clearly defined scope. It is for the legislature to limit or extend the operation of its enactments, and even though there are no self contained limitations, it would be judicial legislation to extend a statute beyond its subject-matter. That is a general rule which would be violated if we were to hold otherwise than we do. But there is a more particular rule equally applicable. It is 'that an existing common-law remedy is not to be taken away by a statute, unless by direct enactment or necessary implication.' King v. Viscoloid Co., 219 Mass. 420, 106 N.E. 988, Ann. Cas. 1916D, 1170."

In Triff v. National Bronze Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E. 2d 232, 121 A.L.R. 1131, the court said:

"The controlling principles of construction may be summarized thus: At the time workmen's compensation was first adopted in Ohio an action for occupational disease or for wrongful death therefrom could be maintained against the employer guilty of actionable negligence. There has never been any statutory or constitutional provision expressly denying the right to maintain an action growing out of a non-compensable occupation disease. The language to be construed is general in character; and the letter should not prevail over the spirit for the pole star of interpretation is the intent of the provisions.

"Since the underlying purpose of compensation is to make industry bear the burden of human wreckage by paying stated awards for injury and loss of life in the course of employment, the court should avoid a strained construction which would leave many employ-

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ees, who are blameless victims of their employer's torts, without either damage or compensation and absolutely remediless. It is an obvious injustice to allow some employees who contract occupational disease compensation and others nothing—not even damages tortiously inflicted. The true objective of compensation could hardly be attained by giving the language a meaning that would work injustice when another course lies open consistent with the spirit manifested in all the constitutional and statutory provisions when considered together. By giving the words of the organic and statutory law their ordinary meaning and keeping in mind the purpose sought, the conclusion is inevitable that the right of action growing out of a non-compensable occupational disease still subsists."

In view of Section 88-2-2 of our statutes we do not adhere to the common law rule suggested by the Minneapolis court as a ground for the rule which it laid down, that statutes in derogation of the common law are to be strictly construed. But the rule of construction announced in the above cases is equally as applicable to our statute under the rule of construction required by the above section as it would be under the common law rule. That section requires that our statutory provisions "are to be liberally construed with a view to effect the objects of the statutes and to promote justice." Before we can liberally construe a statute to effect its objects we must first determine what its objects are, in any event, we are enjoined to construe the statute so as to promote justice. In the above quotation the Ohio court said:

". . . the underlying purpose of compensation is to make industry bear the burden of human wreckage by paying stated awards for injury and loss of life in the course of employment, the court should avoid a strained construction which would leave many employees, who are blameless victims of their employer's torts without either damage or compensation and absolutely remediless."

It would be an obvious injustice to those who are left remediless to so construe the statute. Section 88-2-2 requires us

to construe the statute so as to promote justice unless the statute clearly expresses an intention to the contrary. On this question the comment of the Kentucky court in Jellico Coal Co. v. Adkins, 197 Ky. 684, 247, S.W. 972, 974, is of interest where it is said:

> "The next question is: Is the act exclusive as to diseases not covered by it, or as to these has the injured party a remedy at common law? Much has been written in eulogy of these acts. We have been reminded of the difficulties that the employee encountered at common law in a suit to recover damages for negligence. It has been said that he first had to show negligence on the part of the employer. If he succeeded in that he was handicapped by the doctrine of assumed risk, fellow servants, and contributory negligence, and in the majority of cases was barred of recovery; that under the benevolent influence of these acts he surrendered his claim for pain and suffering and disfigurement, and in return the old common law doctrine of assumed risk, fellow servants, negligence and contributory negligence were all abolished, and the employee is now insured a safe, certain and speedy compensation. It is further claimed that they relieved the employer from the expense and uncertainty of long and vexatious litigation, fix the compensation of the injured one as an item in the expense of the business to be borne in the same way as is the replacement of damaged machinery.
>
> "In other words by the act the subtle refinements and distinctions of the common law are swept aside, and a remedy is found for all the ills incidental to industrial casualties. We are not dissenting from this nor are we assenting to it, but we venture to suggest that if such was the humane purpose of the Legislature, it could hardly have intended as a part of the same act to deny all remedy and all recovery to the employees of this commonwealth who contracted diseases through the negligence of their employers, except as to such as have received traumatic injuries. . . ."

This rule, that the court will not construe the statute so as to cut off all common law remedy in cases where no

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compensation is provided under the statute, except in cases where it is clear that such was the intention of the legislature, is the rule which runs through all the cases. In the cases where it is held that the common law remedy is not available to the employee even though he has suffered a non-compensable injury accept the above rule but conclude that it is clear that such was the legislative intention. It is true that different courts might reach a different result if they were construing the same statute, but they would all use about the same tests in reaching the result. The question of whether the intention of the legislature is clearly shown is largely a question of opinion. Different courts have different opinions.

I will examine our statutes to determine what the legislative intention was:

References to statutes unless otherwise stated are to U. C. A. 1943.

Section 42-1a-3 provides:

> "The right to recover compensation pursuant to the provisions of this act for diseases or injuries to heatlh sustained by an employee and arising out of or in the course of his employment, whether resulting in death or not, shall be the exclusive remedy against the employer."

Section 42-1a-12 provides:

> "The following terms as used in this act shall be construed as follows:
>
> "(a) 'Disablement' means that the event of becoming physically incapacitated by reason of an occupational disease as defined in this act from performing any work for remuneration or profit. Silicosis, as defined in this act, when complicated by active pulmonary tuberculosis, shall be presumed to be total disablement. 'Disability,' 'disabled,' 'total disability' or 'totally disabled' shall be synonymous with 'disablement.'
>
> "(b) 'Compensation' shall mean the payments and benefits provided for in this act."

Section 42-1a-29 provides:

"For the purpose of this act 'silicosis' is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust ($SiO_2$) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations."

Section 42-1a-13 provides:

"(a) There is imposed upon every employer a liability for the payment of compensation to every employee who becomes totally disabled by reason of an occupational disease subject to the following conditions:

• • • • • • •

"(2) No compensation shall be paid for a disease other than silicosis unless total disability results within one hundred twenty days from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

"(3) No compensation shall be paid in case of silicosis unless during the ten years immediately preceding the disablement the injured employee shall have been exposed to harmful quantities of silicon dioxide ($SiO_2$) dust for a total period of not less than five years in this state and unless total disability results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

• • • • • • •

"(b) There is imposed upon every employer a liability for the payment of compensation to the dependents of every employee in cases where death results from an occupational disease, subject to the following conditions:

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"(2) No compensation shall be paid for death from silicosis unless during the ten years immediately preceding the disablement the deceased employee shall have been exposed to harmful quantities of silicon dioxide ($SiO_2$) dust for a total period of not less than five years in this state.

"(3) No compensation shall be paid for death from silicosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from silicosis for which compensation has been paid or awarded, and in such cases compensation shall be paid if such death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed.

"(4) No compensation shall be paid for death from an occupational disease other than silicosis unless death results within one year from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from an occupational disease other than silicosis for which compensation has been paid or awarded, and in such cases compensation shall be paid if such death results within three years from the last day upon which the employee actually worked for the employer against whom compensation is claimed."

The prevailing opinion does not even attempt to analyze or notice the wording of Section 42-1a-3, the exclusive remedy provision although counsel for plaintiff argued that question at length. In my opinion that section throws great light on the question of the legislative intention and I shall review the argument of the parties and analyze its meaning.

Counsel for plaintiff argue that in construing that section, the use of the term "pursuant to the provisions of this act" indicates that it is only in cases where the right to recover compensation is provided for pursuant to the provisions

of this act that such right shall be the exclusive remedy against the employer, and that in all other cases the employee may pursue his common law remedy the same as though this section had not been enacted. They urge that there could be no other purpose in placing that provision in this section of the statute because otherwise it adds nothing whatever to the meaning of that section. If the purpose of that provision was merely to make certain that the "right to recover compensation" means the right to recover such compensation as is provided for pursuant to the provisions of this act, then it is perfectly clear that such was the meaning of that term without adding the term "pursuant to the provisions of this act," this is particularly true since Section 42-1a-12, expressly provides that the term "compensation" as used in this act shall be construed to mean "the payments and benefits provided for in this act." They argue that since in construing a statute, where possible, meaning should be given to every word, phrase and part thereof, we should not construe this section so that this provision adds nothing to the meaning of the statute. This argument would have considerable weight were it not for the fact that if we give to that term the meaning plaintiff's counsel would give it, the next provision, "for diseases and injuries to health sustained by an employee and arising out of or in the course of his employment," adds nothing to the meaning of this section because if the first provision makes the right to recover compensation the exclusive remedy only in cases where compensation is provided for pursuant to the provisions of this act, then such right is limited by Sections 42-1a-13 and 14 to the full extent of and far beyond requirements of the last quoted provision and such provision would add nothing to the meaning of this section.

On the other hand defendants' counsel rather ingeniously argue that in Section 42-1a-3, "the words 'the exclusive remedy against the employer,' 'for diseases or injuries to health' . . . 'shall be pursuant to the provisions of this Act', are so clear in their meaning that this court must refrain from indulging in any construction thereof." While objecting to the court indulging in any construction of this statute they do find it necessary to point out their construction that the word "diseases" plainly means "all diseases",

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and apparently they found it necessary to rearrange and slightly misquote the provisions of the statute in order to make sure that the court would understand their construction thereof. If the statute were as clear in its meaning as they contend, this would not be necessary. If the statute were rearranged and said what they purport to quote it as saying, there would be much force to their argument but the last purported quotation therefrom, "shall be pursuant to the provisions of this Act" is not in the statute. The words "*shall be* the exclusive remedy against the employer" are there and the words "the right to recover compensation *pursuant to the provisions of this Act*" are in another part thereof but the italicized words which constitute the purported quotation, are not placed together and do not give the same meaning as they do in the purported quotation.

The legislature said: "The right to recover compensation pursuant to the provisions of this act for diseases or injuries to health . . . shall be the exclusive remedy against the employer." Counsel would have it say: "The exclusive remedy against the employer for diseases or injuries to health . . . shall be pursuant to the provisions of this act." These two versions do not say the same thing. In the first place the term "pursuant to the provisions of this act" merely modifies, explains or limits the conditions under which the right to recover compensation shall be the exclusive remedy. In the second case the term "the right to recover compensation" which is the subject of the sentence in the statute is entirely omitted, and it is provided that the exclusive remedy shall be pursuant to the provisions of this act. There would have been little difference in the meaning had they merely reversed the order of these two provisions and instead of saying as the statute does: "The right to recover compensation . . . shall be the exclusive remedy . . ." they had said: "The exclusive remedy shall be the right to recover compensation." But counsel in their construction do not merely do that, they entirely omit the term "the right to recover compensation" which was the subject of the sentence as the legislature enacted it, reverse its order and substitute for the omitted term the words "pursuant to the provisions of this act" which in the statute were not the subject of the sentence

but merely a modifier thereof, that is, they explained or limited the meaning of the subject of the sentence. In so doing they try to make the statute say in effect: "The exclusive remedy shall be pursuant to the provisions of this act." If we were again to reverse the provisions of this sentence and still omit the subject of the sentence we would get: "Pursuant to the provisions of this act shall be the exclusive remedy." Which would mean nothing. This illustrates what can be done by rearranging and omitting words as counsel have done with this sentence.

In this statute the words "the right to recover compensation pursuant to the provisions of this act" are placed at the beginning of the sentence and in that order. The term "the right to recover compensation" is the subject of the sentence and is followed immediately by "pursuant to the provisions of this act" which clearly indicates that the second provision was intended to modify, that is, explain or limit the meaning or the application of the first provision. As enacted the statute does not completely spell out or make clear the exact meaning or purpose of the term "pursuant to the provisions of this act" it may signify either one of two different meanings or both of them. The purpose and meaning of the provision may have been to merely identify and limit "the right to recover compensation" to such compensation as may be recovered under that act. Or the purpose and meaning of that provision may have been to limit the application of "the right to recover compensation" to cases where compensation is provided for under this act.

If the object and meaning was to merely identify "the right to recover compensation" as the compensation recoverable under the act, while the meaning would be slightly different from that placed thereon by defendants, it would sustain their position. The statute under that construction if its full meaning were clearly spelled out would read: "The right to recover *the* compensation *which is provided for* pursuant to the provisions of this act for *all* diseases or injuries to health sustained by an employee and arising out of or in the course of his employment, whether resulting in death or not, shall be the exclusive remedy against the employer." As previously pointed out under such con-

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struction the words "pursuant to the provisions of this act" adds no meaning whatever to this statute. Because it is clear without those words that the word "compensation" could mean only the compensation which could be recovered under this act. Any possible doubt on this question is removed by Section 42-1a-12, which defines the word "compensation" as used in this act to mean "the payments and benefits provided for in this act." This argument has some weight notwithstanding the fact that under the other construction the next provision of the statute adds nothing to its meaning.

As above noted defendants found it necessary to point out their construction that the word "diseases" clearly means "all diseases." However, it would have been much more clear that such was the legislative intention had the word "all" been placed in the statute so that it would read: "The right to recover compensation for *all* diseases and injuries to health sustained by an employee and arising out of or in the course of his employment shall be the exclusive remedy against the employer. Had the statute so read it would have rather definitely indicated the legislative intention to make the right to recover compensation the exclusive remedy against the employer in *all* such cases. The fact that this word was omitted very materially weakens defendants' contention that the statute is clear and not subject to construction, and harmonizes it with plaintiff's contention.

If the meaning and purpose of the words "pursuant to the provisions of this act" was to limit the application of the exclusive remedy provision to cases where compensation is provided for under the act this statute if its full meaning were clearly spelled out would read: "The right to recover compensation *where compensation is provided for* pursuant to the provisions of this act for diseases or injuries to health sustained by an employee and arising out of or in the course of his employment, whether resulting in death or not, shall be the exclusive remedy against the employer." Under this construction the right to recover compensation is made the exclusive remedy only in cases where compensation is provided for under the act, in all other cases the employee may pursue his remedy at common law the same as

though this law had not been enacted. The term "exclusive remedy" indicates that the party has been given a remedy which precludes him from all other remedies. It negatives the idea that there are cases where no compensation is provided for but the employee is still precluded from pursuing his common law remedy which he would have had were it not for this act. If we speak of a court as having "exclusive jurisdiction" in a case we mean not only that other courts do not have jurisdiction of the case but also that the court in question does have jurisdiction thereof. So when the legislature used the term "exclusive remedy" it indicated thereby an intention to preclude an employee from his common law remedy only in cases where the right to recover compensation is granted pursuant to the provisions of the act.

The exclusive remedy provision of the California statute which ours was probably patterned after, makes it clear that the words "exclusive remedy" were intended to have the meaning above suggested, as do the codes of other western states. California Labor Code Section 3601; Idaho Code Section 43-1003; Iowa Code 1939, Section 1380.

The prevailing opinion, contrary to defendants' contention, admits that the statute is ambiguous and requires construction. It, however, holds as defendants' counsel contends, that the bench and bar of this state have for many years assumed that an employee has no common law right of action for accidental injuries suffered in the course of his employment against his employer even though no compensation was provided for such accident under the act. How anyone knows what has been assumed by the bench and bar does not appear either from the briefs or the prevailing opinion. No case has been decided in this court which has passed on that question except possibly Young *v.* Salt Lake City, supra, which decided it the other way. If it were true, is this court bound by such an assumption on the part of the bench and bar? In the case of Gray Realty Co. *v.* Robinson, — Utah —, 184 P. 2d 234, the majority of this court did not think so.

It is further asserted in the prevailing opinion that this court has repeatedly construed the Workmen's Compensation Act in accordance with the claimed assumption, and

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that since the provisions of the Occupational Disease Compensation Act uses wording similar to the previous act it must be construed to have the same meaning. Of course the answer to that is that this court has never, except in the Young case, *supra*, had this question presented to it and has never passed on that question under either of those acts. It is true that this court has repeatedly held that where compensation is provided for an accidental injury under the act, the recovery of such compensation is the exclusive remedy of the employee against the employer. But there is no case decided by this court which has gone farther than that. That is the holding in all the cases cited and quoted from in the prevailing opinion which were decided by this court, and none of them are in point nor do they throw any light on the problem presented here. Only three Utah cases require our consideration.

In Murray *v.* Wasatch Grading Co., 73 Utah 430, 274 P. 940, the plaintiff was awarded damages in a common law action for injuries sustained as the result of defendant's negligence. He claimed that at the time of the accident he was not an employee of the defendant. On appeal we held from the evidence that he was an employee of the defendant at that time and that he suffered accidental injury in the course of such employment and was entitled to recover compensation therefor, and that the right to recover such compensation was his exclusive remedy, and he could not maintain his action for damages. This case comes squarely within the construction of this statute which I contend for.

Etna Life Insurance Co. *v.* Industrial Commission, 64 Utah 415, 231 P. 442, was a contest between Etna Life Insurance Company and Travelers Insurance Company, as to which one was liable to pay the compensation which had been awarded to an employee of Westinghouse Electric & Manufacturing Company. In May, 1923, the employee suffered pain from a strain in the course of his employment. At that time Etna was furnishing the employer's compensation liability. In February of 1924, the employee again strained himself in the course of his employment from which a hernia developed and he was awarded compensation therefor. At that time Travelers was furnishing the employer's compensation liability. We held that the strain

suffered in May did not cause the hernia or any disability and therefore was not compensable, but that the hernia and disability for which compensation was awarded was caused by the strain in February and therefore Travelers and not Etna was liable to pay the award. While in the course of the opinion it was said that pain without disability was not compensable, the employee did not ask for damages in a common law action, and we did not discuss or pass on whether he was entitled to recover such damages.

The prevailing opinion cites Hyatt v. Northwestern Hospital, 147 Minn. 413, 180 N.W. 552, claiming that it holds that an employee "could not maintain an action for injuries for which no compensation was provided". In that case the injured employee received compensation for the accident which caused the injury. Then he brought a common law action to recover additional damages because the accident caused him to become impotent which was an element of damages not covered by the compensation act, because it did not cause any disability. The court merely held that where compensation for the accident in question was provided, it was the exclusive remedy even though it did not provide compensation for all the elements of damages which he suffered. In Alaska Packers Assn. v. Ind. Acc. Com., (Cal.) 253 P. 926, the employee applied for and recovered compensation for his injuries, the case does not remotely suggest the problem here presented.

The only case where this court has passed on the question of whether an employee may recover in a common law action for negligence of his employer in a case where compensation is not recoverable under the Workmen's Compensation Act is Young v. Salt Lake City, supra. In that case Bailey was employed by the city to paint trucks with a spray gun, from which he contracted lead poisoning which caused his death. His mother, a Mrs. Young who was his heir and only dependent, after being denied compensation by the Industrial Commission, brought an action to recover damages for his death which she alleged was caused by the negligence of the city. The trial court sustained a demurrer to her complaint on the grounds that such action was barred by Section 42-1-57, which contains the exclusive remedy provisions of the Workmen's Compensation Act. We held

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that his death was caused by an occupational disease which is not an accidental injury, and since plaintiff was not entitled to recover compensation under that act, her common law action to recover damages caused by the employer's negligence was not barred. While the court quoted the exclusive remedy section of that act in full, it does not analyze it or discuss its meaning. It apparently assumed that its meaning is clear and in accord with plaintiff's contentions here. The wording of the exclusive remedy sections of the Workmen's Compensation Act and the Occupational Disease Act which was later enacted are quite similar. Since the legislature enacted the occupational disease act after the decision in the Young case was rendered, the legislature must have thereby adopted the construction placed on the similar provision of the Workmen's Compensation Act by this Court.

Section 42-1-57 which contains the exclusive remedy provision of the Workmen's Compensation Act provides:

> "The right to recover compensation pursuant to the provisions of this title *for injuries sustained by an employee,* whether resulting in death or not, shall be the exclusive remedy against the employer, . . ." (Emphasis ours)

Under defendants' contention this must be construed to mean: "The exclusive remedy against the employer for *all* injuries sustained by an employee shall be pursuant to the provisions of this act." Or, as previously pointed out, what would be more tenable: "The right to recover compensation for *all* injuries sustained by an employee shall be the exclusive remedy against the employer." I have added the italicized word "all" because defendants insist that the similar phrase in the occupational disease act plainly means "all disease or injuries to health sustained by an employee." If this statute had been thus construed in the Young case, the court would have been compelled to reach the opposite conclusion. For if the right to recover compensation is the only remedy against the employer for *all injuries sustained by an employee,* then the plaintiff in that case would have been preclude from maintaining her

common law action against the city. Clearly the employee's death caused by lead poisoning was an injury sustained by him. Not an accidental injury it is true, but this section does not say "for accidental injuries", it merely says "for injuries sustained by an employee". Section 42-1-43, expressly limits the right to recover compensation to an employee who is injured "by accident arising out of or in the course of his employment". But Section 42-1-57 placed no such limitation on this phrase in making the right to recover compensation the exclusive remedy against the employer "for injuries sustained by an employee". And neither by statutory definition nor by judicial construction has such limitation ever been placed on that provision. So to be consistent with plaintiff's contentions here we would have to construe that statute as meaning that for all injuries sustained by an employee the right to receive compensation shall be the exclusive remedy against the employer. Such construction is contrary to our decision in the Young case and cannot be harmonized therewith.

The decision in the Young case can only be sustained by construing the exclusive remedy provision of Section 42-1-57 to mean that the right to recover compensation only where compensation is provided for under that act shall be the exclusive remedy against the employer. By our holding in that case that plaintiff was not barred from her common law remedy since no compensation was provided for occupational diseases, we of necessity must have so construed that statute. The fact that the opinion contains no discussion of the meaning of the statute indicates that the court considered it clear that such was its meaning. Since Section 42-1-57 was so construed prior to the enactment of Section 42-1a-3, the legislature in using practically the same language must be presumed to have adopted the construction which this court had previously placed thereon.

The prevailing opinion cites Del Busto v. E. I. Dupont deNemours & Co., 167 Misc. 920, 5 N.Y.S. 2d 174, affirmed 259 App. Div. 1070, 21 N.Y.S. 2d 417, appeal denied 284 N.Y. 817, 29 N.E. 2d 975; and Moffett v. Harbison-Walker Refractories Co., 339 Pa. 112, 14 Atl. 2d 111, claiming that they support its position. The statutes involved in those cases are so clear that there is hardly room for any argument

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on the question. The New York statute expressly provided that:

> "The liability of the employer prescribed by this article shall be *exclusive and in the place of any other liability whatsoever, at common law or otherwise,* to such employee . . . on account *of any injury, disability, or death, caused by the inhalation of harmful dust . . .*" (Emphasis added)

In the face of that statute which is clear and concise and definite on the point here in question there does not seem to be any ground for any argument whatsoever on the legislative intent. The Pennsylvania statute although not quite so clear when taken with the surrounding circumstances is ample to justify the conclusion reached. These cases are distinguishable from our case on that ground.

In the following cases, all of them, in my opinion, construing statutes much stronger in favor of the employer, the courts have reached the same conclusion that I have reached in this case. Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 201 N.W. 305; Downing v. Oxweld Acetylene Co., 112 N.J.L. 25, 169 Atl. 709, affirmed 113 N.J.L. 339, 174 Atl. 900; Szalkowski v. Osborne & Co., 9 N.J. Misc. R. 538, 154 Atl. 611; Triff v. National Bronze & Aluminum Foundary Co., 135 Ohio St. 191, 20 N.E. 2d 232, 121 A.L.R. 1131.

The case of Triff v. National Bronze & Aluminum Foundary Co., supra, cannot be distinguished in principle from the case at bar. In many respects it indicates much more strongly an intention to abrogate the employee's right to maintain a common law action for damages than does our act. Yet it holds squarely that neither the Ohio statute nor its constitutional provisions deprives the employee of his common law right of action growing out of occupational disease in cases in which the disease or sickness which he contracts was not made compensable. The legislature in that state first adopted its Workmen's Compensation laws in 1911, and a constitutional provision thereon in 1912. In 1921, occupational diseases were first made compensable and a constitutional amendment was adopted thereon in

1923, but silicosis was not included in the schedule of such diseases until 1937. The action in question arose under the 1921 statute and the 1923 constitutional provision after occupational diseases had been made compensable but before silicosis had been included within the occupational disease schedule and about the same limitations on the right to recover compensation for silicosis were contained in their statute as is contained in our statute. In a dissenting opinion the difficulties in administrating such a law on which the majority of this court so strongly relies in our case was pointed out but even in the face of such argument the majority of the court refused to hold that such difficulties coupled with the other facts and circumstances were sufficient to indicate an intention to deprive the employee of his common law right of action in cases where no compensation was provided for under the circumstances in which it was contracted.

The wording of the Ohio statute and the constitutional provision indicate much more clearly an intention to abrogate the employee's common law right of action than does our statute. Those provisions are as follows:

> "Section 35, Article II of the Constitution of Ohio, as amended in 1923 and still in force, contains this provision: 'For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease . . .'"
>
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"In Ohio there is in addition to the constitutional provision a statute, Section 1465-70, General Code, which reads as follows: 'Employers who comply with the provisions of the last preceding section (Para. 1465-69 General Code) shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employe, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured or the dependents of his killed employes as herein provided."

In reaching this decision the Ohio court expressly overruled two previous decisions, Zajachuck v. The Willard Storage Battery Co., 106 Ohio St. 538, 140 N.E. 405, which was very similar to our case of Young v. Salt Lake City, supra, in which that court had held contrary to our holding in the Young case, that their Workmen's Compensation Act, before occupational diseases had been included therein, had abrogated the employee's common law right to recover for lead poisoning contracted in the course of his employment as a result of his employer's negligence; and Mabley v. Lee, 129 Ohio St. 69, 193 N.E. 745, 100 A.L.R. 511, wherein under the very acts which the court was then construing that court had previously held the other way. In addition thereto when the Ohio constitutional provision was adopted, in presenting it to the voters, a statement of a joint committee of employers and employees was issued wherein it was stated that the amendment "wipes out the 'open liability'—giving recourse only to the compensation law for injuries or death arising out of and in the course of the employment." And yet the court in the Triff case held that those provisions only wiped out open liability in cases where compensation had been provided for the very disease which the employee contracted.

If the majority of this court has based its decision adopted the construction which is often repeated in the prevailing opinion, that since the legislature has occupied the field of

occupational diseases it thereby indicated an intention to abrogate the employees' common law right to recover from his employer damages for all occupational diseases, then the Triff case squarely holds contrary thereto, because the Ohio statute expressly provided compensation for occupational diseases. But if the holding of this court is, as the prevailing opinion sometimes indicates, that compensation shall be the exclusive remedy only in case the disease contracted is included within the schedule of diseases adopted by the legislature, then that question was not presented to the court in the Triff case, because silicosis was not included in the Ohio schedule. But that case does hold that the common law remedy is excluded only in case where the very disease contracted is contracted in such a manner as to become compensable under the statute. Under such a construction of the statute it would make no difference whether silicosis was included in the schedule or not, unless the employee contracted a disease which was compensable, in a manner which was compensable then his common law right of recovery against his employer for negligence was not abrogated. That such was the holding in that case is clearly shown by the fact that the dissenting opinion, as above mentioned, pointed out the administrative difficulties under the new statute, which only provided compensation for silicosis, as our statute does, in a very limited type of silicosis case which must be contracted within the time and under the conditions prescribed by the statute. Under the statute and the constitutional provision there involved and the surrounding facts and circumstances the court might well have decided the case the other way without giving any support to the position taken here in the prevailing opinion, but it could not hold as it did without supporting the position contended for in this opinion.

In this connection attention is again called to the fact that under the language of the exclusive remedy provision of our occupational disease statutes, the employee's common law remedy against his employer has been abrogated, either in all cases involving an occupational disease, or it has only been abrogated in cases where the employee contracts a disease under such circumstances that the statute provides

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compensation therefor. There is nothing in the wording of the exclusive remedy provision of our statute that would justify a construction that the recovery of compensation is the exclusive remedy in all cases where a disease is contracted which is included within the schedule of occupational diseases, but is not the exclusive remedy in the case of occupational diseases which are not so scheduled. To so construe our statute would be to entirely disregard the language of our statute, and would not be construing the same but would amount to judicial legislation. The statute either says that the right to recover compensation is the exclusive remedy of the employee against his employer in all cases of disease or injury to health, or it says the right to recover compensation is the exclusive remedy only in cases of disease or injury to health where compensation has been provided therefor.

The prevailing opinion strongly urges and the concurring opinion of Mr. Justice Wolfe is based almost entirely on the grounds that under my construction of this statute there will be great practical difficulties in administering the law. Such matters can only be properly considered to the extent that they tend to show the legislative intention. Otherwise we are not construing what the legislature has enacted but are in the field of judicial legislation. There is nothing before this court which shows that the legislature had such supposed difficulties in mind when it enacted this statute and therefore such difficulties, if they exist, have very little tendency to show the legislative intention. There are many cases, including most of the cases cited herein, where the construction of the statute involved the same practical difficulties which would be encountered here, yet in not one of them did the prevailing opinion ever consider such difficulties as showing a legislative intention.

Most of the supposed difficulties are eliminated by the fact that under this consturiction it is only in cases where no compensation is provided for the injury in question that an action at common law can be maintained. Thus where an employee will become totally disabled within two years after his last employment with the employer against whom he claims, he cannot recover for the period during which

he is only partially disabled either by common law action or under the compensation act because compensation has been provided for the disease he suffered although not for all the elements of his damage. In other words, where he comes within the class of injuries for which compensation is provided, the recovery of such compensation becomes his exclusive remedy even though he suffers damages for which no compensation is provided. See Etna Life Ins. Co. v. Ind. Com., supra, and Hyatt v. Northwestern Hospital, supra.

I do not agree that there will be the great difficulty pictured in the prevailing opinion to determine liability between several employers. Before an employee can recover damages from any of his previous employers he must, the same as he has always had to, establish that such employer proximately caused his injuries. The fact that over a period of years an employee has worked for many employers may in some cases prevent him from establishing a claim against any of them but that does not indicate an intention on the part of the legislature to take away the right to recover even from such employees who can establish their claims against one or more of their previous employers. I feel sure that no case can be found where a court has taken such matters into consideration in determining the legislative intention.

Many undesirable results will flow from the construction which the prevailing opinion has placed on this statute. Under this statute the only persons who can recover compensation are such employees who contract silicosis and become totally disabled therefrom within two years from the last day on which they worked for the employers against whom they claim the right to recover. In view of the normally long period between the time when the disease becomes first discernible by a medical examination and the time when an employee becomes totally disabled, it is probable that many employees who contract silicosis as a result of their employment will not become totally disabled within two years of their last harmful employment. This will be especially true in the future because under this act periodic medical examinations are required, and when it

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is discovered that an employee has contracted that disease he will not be able to retain employment in that kind of work when it is probable that he will become totally disabled therefrom within two years. Although there may be many cases in the future where injury and death from silicosis will be caused by the negligence of the employer, under this decision none of them will ever be able to recover damages therefor, even though no compensation is provided for such cases. I cannot convince myself that the legislature ever intended to create such a situation. I therefore conclude that this case should be reversed.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 362

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NICK MASICH,

*Appellant,*

*vs.*

UNITED STATES SMELTING, REFINING AND MINING COMPANY AND F. S. MULOCK

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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C. W. WILKINS,
PAUL H. RAY,
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*Counsel for Appellees.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 362

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NICK MASICH,

*Appellant,*

*vs.*

UNITED STATES SMELTING, REFINING AND MINING COMPANY, A CORPORATION, AND F. S. MULOCK,

*Appellees*

---

ON APPEAL FROM THE SUPREME COURT OF UTAH

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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As provided for in Rule 7(3) of this Court, appellees submit this statement disclosing matters making against the Court's jurisdiction and move that the appeal be dismissed.

### Opinions Below

The trial court, the District Court of the Third Judicial District of Utah, filed no opinion. The opinion of the Supreme Court of Utah is reported at 191 P. 2d 612 (1948).

## Nature of the Case and Proceedings Below

Appellant initated this action by filing suit against appellees for a declaratory judgment in the District Court of the Third Judicial District of Utah. In essence, he alleged that through appellees' negligence he had incurred silicosis while employed at a Utah mine operated by the appellee, United States Smelting Refining and Mining Company,[1] and that as a result thereof his health had been permanently impaired though not to the extent of rendering him totally disabled. His prayer was that he be declared to have an action at law against the appellees notwithstanding the provisions of the Utah Occupational Disease Disability Law, Utah Code Ann., c. 1A, tit. 42 (1943), as amended, 1945 Laws of Utah, c. 66, p. 145.

Appellees denied negligence and pleaded also that the Occupational Disease Disability Law vested in the Industrial Commission of Utah exclusive jurisdiction of any claim appellant might have.[2]

By stipulation the trial, before a judge only, was limited to the question of whether the statute barred appellant from suing either or both appellees for damages at law.

The trial court held that the statute conferred on the Industrial Commission exclusive jurisdiction of appellant's alleged claims.

On appeal, the Supreme Court of Utah affirmed the judgment, one judge concurring specially and one dissenting. The Industrial Commission seemingly has authority to di-

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[1] The appellee Mulock is Vice President and General Manager of Western Operations for the corporate appellee. For present purposes both appellees may be considered to stand in the same legal position.

[2] Certain other denials and affirmative defenses, not relevant to this appeal, were also pleaded. In addition, the answers noted that appellant then had pending before the Industrial Commission a claim for compensation for total disability resulting from silicosis contracted while in the corporate appellee's employ.

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rect an employer to pay compensation to an employee who has incurred silicosis in the course of his employment only if the employee is totally disabled thereby, but in such cases the duty to pay is absolute and the employer's lack of negligence irrelevant. Thus the Occupational Disease Disability Law, as construed below, shifts certain burdens from employees to employers in the most serious cases and certain burdens from employers to employees in less serious cases.

On June 29, 1948, the Supreme Court of Utah denied without opinion appellant's petition for a rehearing, and on September 17, 1948, Chief Justice McDonough allowed an appeal to this Court. The statutory provision asserted to sustain jurisdiction is that part of 28 U. S. C. Sec. 344 (1946) which has been carried over into 28 U. S. C. Sec. 1257 by the Act of June 25, 1948.

**The Federal Questions Were Not Seasonably Raised**

Appellant now contends that the Utah Occupational Disability Act, as construed by the Utah courts, violates the following provisions of the United States Constitution: the privileges and immunities clause of Art. IV, Sec. 2; the due process clause of the Fifth Amendment; the privileges and immunities clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment; and the equal protection clause of the Fourteenth Amendment.

It is clear that none of these Federal questions were either raised in season or considered by the Supreme Court of Utah; hence, beyond stating that we do not believe them to be substantial, we will not burden the Court with a discussion of the merits.

At no place in the record is there the slightest indication that appellant invoked any provision of the United States Constitution prior to the time he prepared his petition for rehearing in the Utah Supreme Court.

Neither the pleadings nor the assignment of errors to the Utah Supreme Court contains any reference to constitutional issues, state or Federal.[3]

Nor is there anything in the judgment of the trial court or the three opinions by members of the Supreme Court of Utah to suggest that a Federal question was considered by either court *sua sponte*.

Appellant quotes a passage from the Utah Supreme Court's majority opinion as evidence that the court sustained the validity of the Act against a claim that it was repugnant to the Federal Constitution (See Statement as to Jurisdiction, p. 21.) The quotation supports no such conclusion. This Court will not presume that a state court has decided a Federal constitutional question merely because that court's opinion makes use of the words "constitutional" and "unconstitutional";[4] refers generally to the "due course of law";[5] or includes a summary of a case dealing with a Federal question somewhat similar to that sought to be asserted.[6] The only part of the quotation in

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[3] Appellant says that he "contended" before the Utah Supreme Court that the trial court's construction of the statute was "unconstitutional." Even if reference to briefs and statements extrinsic to the record were not unavailing to show that a federal question was raised (*Lynch* v. *New York*, 293 U. S. 52, 54 (1934)), the mere use of the word "unconstitutional" is insufficient to raise a federal question in a state court. *Kipley* v. *Illinois*, 170 U. S. 182, 186-7 (1898). Moreover, it turns out upon inspection of the appellant's main and reply briefs that the only constitutional reference contained therein is to Art. VI, Sec. 23 of the Utah Constitution.

[4] Cf. *Kipley* v. *Illinois*, 170 U. S. 182, 186-7 (1898); *Miller* v. *Cornwall R.R.*, 168 U. S. 131, 134 (1897).

[5] As indicated in the text, *infra*, Utah has a constitutional provision which uses the expression "due course of law." Cf. *Bowe* v. *Scott*, 233 U. S. 658, 664-5 (1914).

[6] *Osborne* v. *Clark*, 204 U. S. 565, 567-8 (1907); *Levy* v. *Superior Court*, 167 U. S. 175, 177 (1897). Reference to a case dealing with the federal right an appellant seeks to assert in this Court is, of course, a factor relevant to a determination of whether the state court did decide the federal question; and, when combined with other factors of similar purport, it may indicate that the question was decided. See *Bryant* v. *Zimmerman*, 278 U. S. 63, 67-9 (1928).

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which appellant could conceivably find comfort is the last sentence, in which mention is made of the state's police power. Even the portion of the opinion quoted by appellant, however, reveals that the Utah court was making but a passing comment on the basis on which the general scheme of workmen's compensation acts had been held not to offend the Federal Constitution. In so many words the quotation shows that the Constitution with which the court was concerned was "the Constitution of this state." Were there any doubts on this point, they would be set to rest by the following passage which occurs at the place where appellant has resorted to asterisks:

> ". . . There are two provisions of our Constitution which have been interpreted in Workmen's Compensation litigation. Section 5, Article XVI, which involved the right to sue for wrongful death, is no longer involved so we are now only concerned with Section 11, Article I, which provides: 'All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.' " 191 P. 2d 612, 623-4 (See Statement as to Jurisdiction, p. 51).

In his petition for rehearing, appellant did rely on the Federal Constitution. The Supreme Court of Utah, however, did not entertain the petition or reply to the new Federal arguments. And it is well settled that a claim of Federal right first asserted in a petition for rehearing is not timely unless the state court in ruling on the petition expressly passes on the question or unless the original ruling of the court could not have been anticipated.[7] The

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[7] *Herndon* v. *Georgia*, 295 U. S. 441, 443-4 (1935); *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 163-4 (1932). In preparing his petition for re-

present case is within neither exception to the general rule.

The four cases on which appellant relies to sustain his contention that the Federal questions were raised in season are not in point.

*Great Northern R. Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358 (1932), is one of a line of cases holding that it is not too late to raise the Federal question in a petition for rehearing where "the grounds of the decision [by the highest state court] supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. . . ." *Id.* at 366-7. In the instant case the Supreme Court upheld the lower court's construction; there was no "surprise" element.

In *San Josè Land and Water Co.* v. *San Josè Ranch Co.*, 189 U. S. 177 (1903), the Federal question not only appeared in the assignment of errors to the state supreme court, but was also fully considered in the opinion of that court and decided adversely to the plaintiff in error. Neither of these factors is present in this case.

*Yazoo and Mississippi V. Ry. v. Adams*, 180 U. S. 1 (1901), is not entirely clear on the pertinent jurisdictional point and there are no subsequent citations to it to aid understanding. The decision seems, however, to have been grounded on the Court's belief that a Federal question, though not set forth explicitly, was so close to the heart of the case that the state supreme court necessarily passed on it in reversing the trial court's judgment. *Id.* at 9-16. In the present case, on the other hand, there is no reason at all for concluding that any Federal question was necessarily determined.

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hearing, appellant seems to have recognized the jurisdictional defect. The last three paragraphs of the petition constitute a virtual acknowledgment that he could not bring the case here unless the Utah court entertained the petition and ruled on the federal questions.

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The applicability of *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.*, 175 U. S. 639 (1900), escapes us.

**Conclusion**

In sum, the appellant has not carried his burden of showing affirmatively that the Court has jurisdiction. See *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942).

The appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 362

NICK MASICH,

*Appellant,*

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY and P. S. MULOCK

APPEAL FROM THE SUPREME COURT OF UTAH.

PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 362

---

NICK MASICH,

*Appellant,*

*vs.*

UNITED STATES SMELTING, REFINING & MINING COMPANY AND F. S. MULOCK,

*Appellees*

---

## PETITION FOR REHEARING

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*To the Honorable Chief Justice and Justices of the Supreme Court of the United States:*

Comes now the appellant in the above entitled cause and respectfully requests this Honorable Court to vacate its order dismissing the appeal in this cause and grant appellant herein a rehearing herein.

Prior to the dismissal of the appeal herein the following proceedings were had:

An action was commenced in the Third Judicial District Court of Utah to secure a construction of the Utah Occupational Disease Disability Law. Utah Code Annotated, 1943, Title 42, Chapter 1a. The proceeding was brought and prosecuted pursuant to Title 104, Chapter 64, Utah Code

Annotated, 1943, which provides for Declaratory Judgments.

The trial court held that the plaintiff was without remedy for the redress of the wrongs complained of.

An appeal was taken to the Supreme Court of Utah, which court in its majority opinion affirmed the judgment of the trial court.

In both the trial court and in the Supreme Court of Utah counsel for the plaintiff argued generally that if the Utah Occupational Disease Disability Law should be construed so as to deprive an employee who was injured because of the negligence of the employer, such law when so construed would offend against the State and Federal Constitution.

After the Supreme Court of Utah rendered its decision construing the Occupational Disease Disability Law to mean that an employee, who contracted an occupational disease on account of the negligence of the employer, is wholly without remedy unless he is rendered totally disabled so that he could not do anything for a profit, the petitioner herein filed his petition with the Supreme Court of Utah for a rehearing. In such petition for a rehearing it was alleged:

> "Comes now the plaintiff in the above entitled cause and moves this Honorable Court to grant a rehearing; that the construction that should be given the Workmen's Occupational Disease Act of Utah be re-examined to the end that such Act be so construed as to do justice to both employer and employee and so that the same will not conflict with Article 4, Section 2 or with the 5th and 14th Amendments of the Constitution of the United States or with Sections 7, 11 and 24 of Article 1 of the Constitution of Utah, and if the Act may not be so construed that it be declared unconstitutional because it offends against and is in conflict with Article 4, Section 2 and with the 5th and 14th Amendments of the Constitution of the United States and with Sections 7, 11 and 24 of Article 1 of the Constitution of the State of Utah.

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"The basis upon which this petition for a rehearing is bottomed is upon the claim that in the majority opinion the court erred in the following particulars:

1. This court erred by in effect concluding that the opinion of the Supreme Court of the United States in the case of New York Central R. R. Co. *v.* White, 243 U. S. 188; 37 S. Ct. 247 holds that a Workmen's Compensation Act comparable with the Act here brought in question to be constitutional.

2. That if the Utah Occupational Disease Act means what the court has construed it to mean then and in such case the Act is in conflict with the provisions of Article 4, Sec. 2 and of the 5th and 14th Amendments of the Constitution of the United States and with Sections 7, 11 and 24 of the Constitution of the State of Utah.

3. The court erred in the majority opinion in holding that if an injured employee has a common law remedy for partial disability such employee would have two causes of action for one wrong in that the Occupational Disease Act gives an injured employee a right to compensation if and when he suffers total disability.

4. The court erred in holding that the kind of affliction with which the plaintiff is afflicted is silicosis within the meaning of the Act and hence covered by the Act.

5. The court erred in holding that under its police powers the legislature has the power to enact a law such as the Occupational Disease Act, if and when such Act is given the construction which is given to it by the majority opinion of the court.

6. That the court erred in the majority opinion in that it cannot be determined from such opinion whether the Act covers the entire field of diseases or injuries to health which results from and are contracted in the course of employment or only such diseases or injuries to health as are enumerated in the Act.

7. The court erred in construing the Act in the manner it was construed because any other construction would render the Act difficult of administration."

In its printed brief the appellant argued that the Act offended against both the State and Federal Constitutional provisions mentioned in the petition for a rehearing and urged the court to pass upon the question of whether the Act when construed as it was construed did not offend against the constitutional provisions set out in the petition for a rehearing. That brief concluded as follows:

> "However, we do most strongly urge this court to re-examine the question as to whether or not the construction placed on the Act by the majority opinion does not render the Act unconstitutional, and particularly when viewed in the light of the provisions of the Constitution of the United States to which reference is made in the petition for a rehearing.
>
> The effect of the construction placed on the Act is of such far reaching effect and so vital to the interests of the plaintiff and all others similarly situated that we would be derelict in our duty to our client if we should fail to attempt to secure a decision as to the constitutionality of the Act by the final arbiter of such questions.
>
> In order to accomplish that purpose it is necessary that this court first decide such questions and in order to avoid the necessity of again presenting such question in another proceeding we most earnestly and respectfully urge this court to re-examine the matter of whether or not the Act as heretofore construed by this court offends against the constitutional provisions mentioned to the end that a final decision may be secured touching the constitutionality of the Act."

The petition for a rehearing was by the Supreme Court of Utah denied, without opinion. A short time after the petition for a rehearing was denied one of counsel for the petitioner herein inquired of the Justice of the Supreme

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Court of Utah who had written the prevailing opinion in this cause if the court would not render a written opinion disposing of the Federal Constitutional questions presented by the petition for a rehearing and was informed by such justice that the court had considered and passed upon such questions and had concluded that the Occupational Disease Disability Law did not offend against the Federal Constitutional provisions relied upon by the petitioner in his petition for a rehearing.

Thereupon the petitioner herein prosecuted an appeal to this Court and filed herein such documents as were deemed necessary to perfect such appeal. After the above entitled cause was docketed in this Court the appellees filed their motion to dismiss the appeal. Very soon after the motion to dismiss the appeal in this cause was filed in this Court one of counsel for appellants herein requested the chief justice of the Supreme Court of Utah to furnish to counsel for petitioner herein a certificate showing that the Federal Constitutional questions specifically mentioned in the petition for a rehearing had been considered and passed upon by the Supreme Court of Utah. The chief justice of the Supreme Court of Utah stated that as soon as he could secure the attendance of all the justices of that court he would take the matter up with the other members of the court. After the lapse of a number of days the chief justice of the State of Utah gave counsel for the petitioner the certificate requested, which certificate reads as follows:

> "I, Rodger I. McDonough, Chief Justice of the Supreme Court of the State of Utah, hereby certify:
>
> That in the above entitled cause, the question whether the "Utah Occupational Disease Disability Law" Chapter 1a, Title 42, Utah Code Annotated, as amended 1945, and its applications in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no

state shall deprive any person of life, liberty, or property without due process of law, and also repugnant to Article Four Section Two of the Constitution of the United States and the Fifth Amendment to the Constitution of the United States, was considered and passed upon by this court.

By the Court (S.) RODGER I. MCDONOUGH,
*Chief Justice.*

Dated this 10 day of November, 1948.
Attest:
By (S.) L. M. CUMMINGS,
*Clerk.*"

The certificate was given one of counsel for the petitioner herein at about 5:00 o'clock P. M. on November 10, 1948, the day following November 11th was a holiday and on November 12, 1948 a service of a copy was had upon counsel for the appellees and on the same day, November 12, 1948, the said certificate was sent by airmail to the clerk of this Court. Your petitioner is informed by the clerk of this Court that the certificate was not received by him until November 15, 1948, after this Honorable Court had granted the motion to dimiss the appeal in this cause.

In support of this petition for a rehearing your petitioner refers to and makes a part hereof the records and files herein an affidavit which is hereunto attached, marked Exhibit "A" and made a part hereof.

The following cases are believed to support petitioner's claim that the certificate of the chief justice of the Supreme Court of Utah is proper matter to consider by this Court in passing upon this petition:

In the case of *Thomas Armstrong, et al.*, v. *The Treasurer of Athens County,* 16 Peters 281, 10 L. Ed. 965, it is said:

> "In the case now before us, the presiding judge of the Supreme Court of Ohio has certified on the record that the validity of a statute of the State was drawn in

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question, on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of the validity of said statute; and this certificate of the judge is certified by the clerk, as a part of the record. We presume that the certificate of the presiding judge was made by the authority of the court; and as this bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise, and was decided, the case comes within the fourth clause above mentioned, and this court must take jurisdiction, and examine whether the point so certified was rightfully decided."

In the case of *Cincinnati, P. B. S. & P. Packet Co.* v. *Bay*, 50 L. Ed. 428, it is said:

"No opinion was delivered, but a certificate that this objection was relied upon, and that it necessarily was considered, was made a part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised, and the certificate shows that it was not treated as having been raised too late under the local procedure,—a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the state." (Mr. Justice Holmes)

In the case of *Major Raymond Lisenba* v. *The People of the State of California*, 314 U. S. 219-243, 86 L. Ed. 166, it is said:

"Rehearing was granted in the California Supreme Court, the decision reaffirmed the former decision. In a second petition for a rehearing, for the first time, petitioner raised a Federal Constitutional question. On November 3rd 1939, the state court ruled 'the petition for a rehearing herein is denied'.

The chief justice of the state allowed an appeal and executed a certificate in which it was stated, certain Federal questions were raised by the second petition

for rehearing, and that the court overruled such contentions. On the record so made this court held, that it had jurisdiction to review the judgment."

Other cases in point are:

*Consolidated Turnpike Co.* v. *Norfolk and Ocean View R. R. Co.*, 228 U. S. 596, 33 Sup. Ct. 605, 57 L. Ed. 982;
*Victor J. Herb* v. *Norman Pitt Cario*, 324 U. S. 117, 65 Sup. Ct. 459, 89 L. Ed. 789.

WHEREFORE, petitioner prays that he be granted a rehearing; that the order dismissing the appeal herein be vacated and that this Honorable Court assume jurisdiction of the above entitled cause to the end that the validity or invalidity of the Occupational Disease Disability Law of Utah here brought in question be determined by this Honorable Court.

Respectfully submitted,

CLARENCE M. BECK,
WILLIAM A. HILTON,
ELIAS HANSEN,
*Attorneys for Appellant.*

Clarence M. Beck and Elias Hansen, hereby certify that they are two of the attorneys for the appellant in the above entitled cause; that they and each of them further certify that in their opinion there is merit in the foregoing petition for a rehearing and that the same is filed in good faith and not for delay.

CLARENCE M. BECK,
ELIAS HANSEN.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

---

# No. 362

---

NICK MASICH,

*Appellant,*

*vs.*

UNITED STATES SMELTING, REFINING & MINING COMPANY AND F. S. MULOCK,

*Appellees*

---

## AFFIDAVIT

---

STATE OF UTAH,
County of Salt Lake, ss:

Clarence M. Beck, being first duly sworn, deposes and says: That he is and at all times herein alleged has been one of the attorneys for the appellant herein; that a short time (the exact time affiant does not now recall), after the petition for a rehearing was denied in the above entitled cause affiant inquired from Justice Latimer (who wrote the prevailing opinion in the above entitled cause) why a written opinion was not rendered disposing of the Federal Constitutional question raised by the petition for a rehearing. That in response to the inquiry Justice Latimer informed affiant that such Federal question had been considered and passed upon by the court and the conclusion

reached that the Occupational Disease Disability Law did not conflict with the provisions of the Federal Constitutional provision mentioned in the petition for a rehearing. Affiant further avers that upon receipt of a copy of the motion to dismiss the appeal of this cause in this Court affiant proceeded to examine the authorities cited in such motion and other authorities touching the question involved. That after making such examination he inquired from the Chief Justice of the Supreme Court of Utah if that court had considered and passed upon the matter of whether or not the Occupational Disease Disability Law of Utah was in conflict with the Federal Constitutional provisions mentioned in petition for a rehearing and if the court had so passed on such matters if the Chief Justice would give a certificate showing the facts. That the said Chief Justice informed affiant that he would take the matter up with the other members of the court when they were available. That after the lapse of a number of days the Chief Justice gave affiant the certificate which is set out in the petition for a rehearing filed herewith and affiant caused the same to be served on appellees' counsel and sent by air mail to the clerk of this Court as alleged in the foregoing petition for rehearing.

CLARENCE M. BECK.

Subscribed and sworn to before me this 24th day of November, 1948.

FLORENCE McDERMOND,
*Notary Public,*
*Residing in Salt Lake City, Utah.*

My Commission Expires 7-14-51.

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Office-Supreme Court, U. S.
FILED
DEC 14 1948
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948.**

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## No. 362

---

NICK MASICH, *Appellant*,

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY and F. S. MULOCK, *Appellees*.

---

ON APPEAL FROM THE SUPREME COURT OF UTAH

---

## RESPONSE TO PETITION FOR REHEARING.

---

C. W. WILKINS,
PAUL H. RAY,
CHARLES A. HORSKY,
*Attorneys for Appellees.*

CHENEY, MARR, WILKINS & CANNON,
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
*Of Counsel.*

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948.**

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## No. 362

---

NICK MASICH, *Appellant*,

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY and F. S. MULOCK, *Appellees.*

---

ON APPEAL FROM THE SUPREME COURT OF UTAH

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## RESPONSE TO PETITION FOR REHEARING.

---

As permitted by Rule 33(1)(a) the appellees submit this response to the appellant's petition for rehearing.

### Proceedings to Date.

On March 25, 1948, the Supreme Court of Utah affirmed a declaratory judgment construing Utah's Occupational Disease Disability Law[1] to bar an employee from recover-

[1] Utah Code Ann., tit. 42, c. 1a (1943), as amended, 1945 Laws of Utah, c. 66. The particular section at issue was § 42-1a-3.

ing damages or compensation for partial disability resulting from silicosis incurred through his employer's negligence.[2] The record gives no hint that any federal question was either raised or decided up to this point.

On May 6, appellant filed a petition for rehearing in which he did raise certain federal questions. The brief in support of that petition concluded as follows:

> "In order to accomplish that purpose [a review by this Court] it is necessary that this court [the Supreme Court of Utah] first decide such questions and in order to avoid the necessity of again presenting such question in another proceeding we most earnestly and respectfully urge this court to re-examine the matter of whether or not the Act as heretofore construed by this court offends against the constitutional provisions mentioned to the end that a final decision may be secured touching the constitutionality of the Act."

Although appellant's problem was thus explicitly called to its attention, the Supreme Court of Utah on June 29 denied the petition without opinion.

On September 17 Chief Justice McDonough allowed an appeal, and on September 29 appellees served their motion to dismiss. On November 15 this Court granted the motion and dismissed the appeal "for want of a properly presented Federal question."

On November 26 appellant filed the present petition for a rehearing. Upon seasonable application Mr. Justice Rutledge allowed appellees an extension of time to December 14 within which to file this response.

**New Matter Contained in the Petition for Rehearing.**

The petition is based upon a certificate from Chief Justice McDonough and an affidavit by one of appellant's attorneys. The certificate says that the Utah Supreme Court

[2] Appellees denied negligence, but the case was tried in such a way as to reserve that issue for later determination if the statute should be construed in appellant's favor.

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considered and passed upon the question of whether the Utah statute, as applied in this case, was repugnant to the due process clause of the Fourteenth Amendment, Art. IV § 2, and the Fifth Amendment of the federal constitution. The affidavit recounts private conversations the affiant attorney had with the chief justice and another justice of the Utah Supreme Court.

Appellant's duty, of course, is to show affirmatively from the record that a substantial federal question was seasonably presented, that it was actually decided, and that its decision was necessary to affirmance of the judgment. It should go without saying that the affidavit does not form part of the record and for jurisdictional purposes is not properly before this Court.

## Argument.

There are four separate and independent reasons, we believe, why the petition for rehearing should be denied: (1) For purposes of establishing this Court's jurisdiction the certificate is insufficient to show that a federal question was properly presented and decided. (2) If the certificate should be considered sufficient to show that fact, it is nonetheless insufficient to show that resolution of any federal question was necessary to the decision. (3) Even if decision of a federal question was necessary to disposition of the case, the question is not substantial. (4) In any event, the facts of this case make it appropriate for the Court to withhold exercise of its discretionary power to grant a rehearing.

### (1) The certificate is insufficient to show that a federal question was properly presented and decided.

The authorities do not make entirely clear the effect which the Court will give to certificates in any particular case.

The latest general compilation of cases appears in the first footnote to *Charleston Federal Savings & Loan Ass'n*

v. *Alderson*, 324 U. S. 182, 186 (1945). The footnote says that "generally" the certificate of the highest state court, as such, will be sufficient to establish jurisdiction "when it is consistent with the record," but that the certificate of the court's chief justice will not be. The holding of the case, however, was only that a certificate of the presiding justice of the West Virginia Supreme Court, absent confirmatory evidence in the record, would not sustain jurisdiction.

The most recent full discussion of the function of a certificate of the highest state court itself is contained in *Honeyman* v. *Hanan*, 300 U. S. 14 (1937). Speaking for a unanimous Court, Mr. Chief Justice Hughes there reviewed the authorities and concluded:

> "A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present." *Id.* at 18-19.

Later in the opinion he said:

> "Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the federal question was properly raised and was necessarily determined. Our decisions in cases where certificates have been found useful should be read in the light of that fundamental consideration." *Id.* at 22.

A footnote was devoted to the "insufficiency of a certificate by the chief justice or presiding justice of the state court." *Id.* at 18 n. 1.

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Thus it seems that neither the certificate of the highest state court nor that of its chief justice will be considered sufficient in itself to sustain this Court's jurisdiction of an appeal. Both will be given consideration in explaining ambiguities in the record, and the certificate of the court will be accorded greater weight in this regard than that of the chief justice. But in neither case will the certificate be permitted to "import into the record a federal question which otherwise the record wholly fails to present." This underlying reluctance to give effect to certificates presumably does not result from doubt as to their accuracy. Instead it reflects the Court's persistent effort to construe strictly its statutory jurisdicion and to avoid unnecessary decision of constitutional issues—especially those affecting the delicate balance between state and federal power.[3]

In view of the authorities, our first question, then, is whether the present certificate should be treated as the certificate of the Utah Supreme Court or simply that of the chief justice. Here an ambiguity arises. The certificate is certainly not expressly that of the entire court, nor is it signed by all members of the court.[4] The words "By the Court" might be construed to make it the certificate of the chief justice as agent of the court. On the other hand, it is captioned "Certificate of the Chief Justice" although that fact does not appear from the printed petition; it begins "I, Rodger I. McDonough, Chief Justice of the Supreme Court of the State of Utah, hereby certify;" and it contains no recital that it was executed at the direction of the court or with specific approval of all members or even a majority of the court.[5]

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[3] Cf. the dissent in Indiana ex rel Anderson v. Brand, 303 U. S. 95, 110-1 (1938), a case in which a certificate signed by all members of the state court was held sufficient to explain an ambiguous statement in the opinion.

[4] See Indiana ex rel. Anderson v. Brand, supra note 3.

[5] See Consolidated Turnpike Co. v. Norfolk and Ocean View Ry., 228 U. S. 596, 598 (1913).

A second question which must be answered before the effect of the certificate can be appraised in this case is whether it applies to the original hearing by the Supreme Court of Utah or to the denial of a rehearing. Here the doubt is even more pronounced. The certificate says only that the three federal constitutional questions were considered and passed upon in "the above entitled cause." At what stage this was done is not stated. The natural assumption would be that it was on denial of rehearing. Yet there are factors opposed to such a construction. The concluding paragraph of the petition put the Utah Supreme Court on notice that appellant could not obtain a review here unless that court entertained the petition and expressly passed upon the federal questions. If the Utah Supreme Court had decided those questions for the first time on rehearing and was disposed to frame the record to give appellant undoubted standing to appeal, it would seem logical for it to have heeded his request for an opinion. From the denial without opinion, followed by the certificate over four months later, it might be inferred that the court was and is under the impression that the federal questions were so similar to the state constitutional issue it expressly decided on the original hearing that they could be deemed to have been resolved *sub silentio* at that time. Additional support for this construction lies in the Utah Supreme Court's frequently expressed rule that it will not consider on rehearing points not brought to its attention in the normal way before the original hearing.[6]

We will assume *arguendo* that the certificate is that of the Utah Supreme Court rather than of the chief justice himself. If on that assumption it is insufficient, *a fortiori* it would be insufficient if taken as the certificate of the chief justice personally. In either case, as mentioned above, the

---

[6] See Pingree National Bank v. Weber County, 54 U. 599, 183 Pac. 334; Western Securities Co. v. Silver King Consolidated Mining Co., 57 U. 88, 192 Pac. 664; In re Lowe's Estate 68 U. 49, 249 Pac. 128; Dalquist v. Denver & R. G. RR., 52 U. 438, 469, 174 Pac. 833, 843.

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basic issue is whether the record contains other evidence that the federal questions were actually decided.

Taking the certificate first as applying to the original hearing, the record, as shown in our motion to dismiss, reveals a complete want of anything else to suggest decision of any federal question. In terms of the language quoted above from *Honeyman* v. *Hanan* this certificate would not merely "aid in the understanding of the record," it would not "clarify" the record, and it would not show "how the question was raised." On the contrary, it would "import into the record a Federal question which otherwise the record wholly fails to present." As a practical matter it is probably true that the Utah Supreme Court would uphold the statute against a claimed repugnancy to the federal constitution by reasoning similar to that by which it sustained the act against the "due course of law" clause of the Utah Constitution.[7] But that is not enough to establish this Court's jurisdiction. To do that there must have been a decision of the federal questions *qua* federal questions.[8]

Reading the certificate as applying to the denial of a rehearing, the same result follows. The federal questions were posed, together with questions of state law, in the petition. But, as mentioned above, nothing in the Utah precedents would indicate that they were decided when the rehearing was denied without opinion. In this regard, of course, Utah merely follows the practice usual throughout the country, a practice recognized in this Court's well-established rule that a federal question raised for the first time in a petition for rehearing in the highest state court is, in general, not seasonably raised for jurisdictional purposes. In the language of *Fullerton* v. *Texas,* 196 U. S. 192, 194 (1905),

> "... on the face of the record proper and from the opinions, the reasonable inference is that the court

[7] Utah Const. Art. I, § 11. See 191 P. 2d. 612, 624-5.

[8] 28 U. S. C. § 1257; cf. Bowe v. Scott, 233 U. S. 658, 664-5 (1914).

> may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late. . . ."[9]

These considerations suggest that the Supreme Court of Utah, if it decided the federal questions on rehearing, may well have done so without experiencing the compulsion to ponder them with the precision and deliberation it would have if an opinion had been required or if the questions had been raised before the original hearing.

The only case we have found in which a certificate was squarely held sufficient to show that the denial of a rehearing was based on decision of a federal question is *Lisenba* v. *California*, 314 U. S. 219 (1914). The special circumstances of that case may well put it in a class apart. Lisenba had been convicted of murder and was under sentence of death. Not until his second petition for rehearing before the California Supreme Court did he raise federal questions. That petition was denied without opinion November 3, 1939. On November 8 the Chief Justice of California executed a certificate in which he enumerated the constitutional questions presented by the second petition for rehearing; stated that the court entertained the petition, and explicitly overruled each of the contentions made therein; certified that the decision denying rehearing "is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States . . . were violated"; and concluded: "It is ordered that this certificate be filed in this court and made a part of the record on appeal to the Supreme Court of the United States." The State's brief in the case did not contest jurisdiction, and the Court commented only that "On the record so made, this court has jurisdiction . . .", citing

[9] The **Fullerton** case involved a certificate of the presiding judge executed "some weeks" after a rehearing was denied. The quoted remarks, however, are applicable whatever nature the certificate takes on.

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four cases not involving rehearings. The certificate, it will be noted, is much more detailed than that in the present case. It was also executed almost contemporaneously with the order it explained. More important, the very fact that it related to a capital case was a persuasive independent indication that the California court did indeed entertain the petition and decide with utmost deliberation the federal questions it presented.[10]

In short, we do not believe that the certificate cures the jurisdictional defect noted in this Court's *per curiam* order of November 15, 1948. It is ambiguous as to the authority behind it, and this in the face of the consistent differentiation this Court has made between various types of certificate. It is ambiguous as to the stage of the proceedings at which the federal questions were raised and decided, and this in the face of the Court's repeated emphasis on the jurisdictional importance of such information.[11] And it is not supported by other material appearing in the record. The appellant, we believe, has still fallen short of shouldering the burden of affirmatively demonstrating that the Court has jurisdiction over this appeal.

**(2) The certificate is insufficient to show that resolution of the federal questions was necessary to the decision.**

The certificate states that three federal questions were passed upon. Nothing in the certificate, however, negates the possibility that there were alternative bases on which the decision may have rested. Whether the certificate applies to the original hearing or the rehearing, it would not be unusual if the Utah Supreme Court had considered its action equally justified by its discretionary power to

[10] Behind the Court's decision to apply its jurisdictional rules somewhat less strictly than usual there may have been another consideration: exercise of jurisdiction resulted in review of the propriety of a single conviction, not of the validity of a statute of broad application which had the imprimatur of all three branches of the state government.

[11] See, e. g., Rule 12, para. 1; Rule 38, para. 2.

refuse to reverse on the strength of points not raised at the first opportunity. If that was the case, the decision below would rest on an adequate, independent state ground.

**(3) The federal questions are not substantial.**

The certificate indicates that the Utah statute in question was attacked under three different clauses of the Federal Constitution: "Article Four Section Two", the "Fifth Amendment" and the due process clause of the Fourteenth Amendment.

We assume that the reference to "Article Four Section Two" is to the privileges and immunities clause of that section. Since, however, appellant states in his complaint that he is a resident of Utah and indicates that he has met all the residence requirements of the statute, he is in no position to rely upon a clause designed to protect citizens of other states against discrimination by Utah. See *Toomer* v. *Witsell*, 334 U. S. 385, 395-6 (1948).

Similarly we suppose that it is the due process clause of the Fifth Amendment upon which appellant relies. That clause, however, operates as a restriction on the federal government, not on the states.

The challenge based on the due process clause of the Fourteenth Amendment is the only one with any color. Appellant's contention is that the Utah Occupational Disease Disability Law offends the clause in that it deprives an employee who is not totally disabled of his common law right to sue his employer for damages. The mere fact that the Law abolishes common law rights does not mean that it violates the due process clause. See *Silver* v. *Silver*, 280 U. S. 117, 122 (1930). The question is whether the Law, viewed in its entirety, is so unreasonable, arbitrary and capricious that its passage transcended the power of the State of Utah. See *Nebbia* v. *New York*, 291 U. S. 502 (1934); *N. Y. Central RR.* v. *White*, 243 U. S. 188 (1917). Consideration of that question requires examination of

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the background of the statute and analysis of exactly what it does.

In 1937 the first bill covering compensation for disability resulting from occupational diseases was introduced in the Utah legislature. The bill was defeated by a narrow margin, as was a similar bill early in 1939. As a result, however, the 1939 legislature passed an act which directed the State Board of Health to make a systematic survey, in collaboration with the United States Public Health Service, to determine the nature and extent of the occupational disease problem in Utah. The same statute directed the Utah Industrial Commission, which had long administered the state's Workmen's Compensation Law, to select a committee from management and labor to draft an occupational disease bill.[12] The survey was made and a report submitted in the fall of 1940. The drafting committee, consisting of three representatives from management, three from labor and an ex officio chairman, was appointed and early in 1941 reported to the legislature a bill which the committee members unanimously agreed upon and which they considered "fair both to industry and to labor." They urged its passage without amendment.[13] The bill passed both houses of the 1941 legislature without a dissenting vote.[14] That is the statute appellant is now attacking.

In broad outline, the statute requires an employer to pay compensation at a set rate to an employee or his dependents if the employee has suffered death or total disablement (temporary or permanent) from any one of specified occupational diseases incurred in the course of his employ-

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[12] Utah Laws of 1939, c. 131. By § 4, a special fund of $25,000 was appropriated for the state's contribution to the expenses of the state-federal survey.

[13] Utah House Journal 86-7 (1941).

[14] Id. at 264-5; Utah Senate Journal 330 (1941). Other references to the bill appear in House Journal 92, 163, 203, 252, 293, 461, 462, 634 and 795 and in Senate Journal 310, 322, 586, and 587.

ment.[15] Silicosis is one of the diseases listed, and because of its nature various general provisions of the Law, such as that covering the limitations period, are made more liberal than in the case of other diseases.[16] In addition, and again unlike other diseases, silicosis complicated by active pulmonary tuberculosis is presumed to effect total disablement.[17] In the event of total disablement the employee is thus sure of recovering the statutory compensation and of doing so expeditiously and without further expense. He need not hire lawyers, he need not prove negligence on the part of the employer, and he need not overcome the traditional common law defenses of contributory negligence, assumption of risk, and negligence of a fellow-employee. For disability falling short of the statutory definition of total disablement, on the other hand, the employee has no legal recourse.

It is not without significance that at least ten other states and England have statutes which bar the payment of statutory compensation for partial disability resulting from silicosis. See 3 Colo. Stats. Ann. §§450, 458-9 (1947 Cum. Supp.); Md. Code Ann. Art. 101, §14, 24 (Flack, 1947 Cum. Supp.); 4 Ann. Laws of Mass. c. 152, §§76-8 (1942, 1947 Cum. Supp.); Mich. Stats. Ann. §17.223 (1947 Cum. Supp.); N. J. Stats. Ann. §34:15-35.4 (1947 Cum. Supp.); N. M. Laws of 1945, c. 135, §4(a) and 10(a); 64 Consolidated Laws of N. Y. Ann. §§11 (McKinney, 1946), 39, 49-a (McKinney, 1948 Supp.); Ohio Gen. Code §1465-68a (Paige, 1946); 77 Penn. Stats. Ann. §1401(e) (Purden, 1947 Cum. Supp.); R. I. Gen. Laws of 1938, c. 300, as amended Laws of 1942, c. 1245, §3); The Workmen's Compensation Act of 1925, 15 & 16 Geo. 5, c. 84, para. 47.

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[15] Utah Code Ann. §§ 42-1a-12(a), 42-1a-13, 42-1a-28 (1943).

[16] Id. § 42-1a-49; see also §§ 42-1a-13(a)(2) and (3), 42-1a-13(b)(3) and (4).

[17] Id. § 42-1a-12. In addition, full compensation is payable for death from silicosis complicated by tuberculosis. Id. § 42-1a-30.

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So far as we have been able to ascertain, it is assumed that each of these statutes was intended to occupy the entire field of silicosis and to cut off any common law rights which there might have been to recover for partial disability. Two of the laws, those of New York and Pennsylvania, have been so construed by the courts of those states.[18]

The dates on which the statutes above were enacted show that it is only in comparatively recent years that the states have tackled the grave personal, social and economic problem presented by industrial diseases. In shaping its initial experiment in the field, Utah deemed it wise to bar compensation for partial disability. Whatever the reasons were—perhaps a desire to make a cautious start, perhaps the difficulty of diagnosing accurately the preliminary stages of silicosis and the attendant risk of fraud, perhaps something else—the decision had the approval of labor members on the Utah committee and all members of the state legislature, and it accorded with the decisions reached by law-makers in many other jurisdictions.[19] Such a law can hardly be called arbitrary or capricious. And, as was said in *Olsen* v. *Nebraska*, 313 U. S. 236, 246 (1941), this Court is not properly concerned with "the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the constitution—to the States and to Congress.'" [Citing Mr. Justice Stone's dissent in *Ribnik* v. *McBride*, 277 U. S. 350, 375 (1928)].

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[18] Del Busto v. DuPont de Nemours & Co., 167 Misc. 920, aff'd 259 App. Div. 1070, appeal denied 284 N. Y. 817, 29 N. E. 2d 975 (1940); Moffett v. Harbison-Walker Refractories Co., 339 Pa. 112, 14 A. 2d 111 (1940); cf. Scherini v. Titanium Alloy Co., 286 N. Y. 531, 37 N. E. 2d 237 (1941).

[19] New York has recognized the complexity, as well as the importance, of the partial disability problem by recently enacting a law calling for the appointment of medical experts to investigate the "feasibility" of paying compensation for it. 64 Consol. Laws of N. Y. Ann. § 49-a (McKinney, 1948 Cum. Supp.).

**(4) The petition should be denied in the exercise of this Court's discretionary power over rehearings.**

Even if the Court should disagree with all the arguments heretofore set forth, the facts of this case make it appropriate that the petition be denied. From the appellant's standpoint, he has had the services of capable and respected counsel and ample opportunity to raise the federal questions at an earlier stage of the case. Being aware of the jurisdictional defect in his appeal as early as the time he petitioned the Utah Supreme Court for a rehearing, there was likewise no occasion to wait over four months after the denial of that petition before obtaining the certificate. From the Court's standpoint, there is no doubt but what the November 15 order dismissing the appeal was correct when entered; there could be no question of an abdication of jurisdiction if this rehearing were denied and the decision of a constitutional question touching state power thus avoided. The grant of a rehearing on the basis of the tardy certificate here involved would also condone a practice which is hardly conducive to the orderly dispatch of the Court's business. Should the rehearing be granted, moveover, the Court would be without the benefit of the discussion it might otherwise expect from the court having most intimate knowledge of the statute, the Supreme Court of Utah.[20]

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[20] Utah Const. Art. VIII, § 25 requires that the reasons for any judgment of the Supreme Court of Utah be stated in writing. Thus, if the federal questions should be urged in a later suit, the presumption is that they would be dealt with in an opinion.

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## Conclusion.

The petition for rehearing should be denied.

Respectfully submitted,

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No. 362. MASICH *v.* UNITED STATES SMELTING, REFINING & MINING CO. ET AL. Appeal from the Supreme Court of Utah. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Clarence M. Beck, William A. Hilton* and *Elias Hansen* for appellant. *Paul H. Ray* and *Charles A. Horsky* for appellees. Reported below: — Utah —, 191 P. 2d 612.

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